No. 04-1067
Title: Georgia, Petitioner
v.
Scott Fitz Randolph
Docketed: February 9, 2005
Lower Ct: Supreme Court of Georgia
Case Nos.: (S04G0674)
Decision Date: November 8, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~
Feb 4 2005	Petition for a writ of certiorari filed. (Response due March 11, 2005)
Mar 10 2005	Brief of respondent Scott Fitz Randolph in opposition filed.
Mar 23 2005	DISTRIBUTED for Conference of April 15, 2005.
Apr 18 2005	Petition GRANTED.
May 26 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 16, 2005.
Jun 15 2005	Joint appendix filed.
Jun 15 2005	Brief of petitioner Georgia filed.
Jun 16 2005	Brief amicus curiae of United States filed.
Jun 16 2005	Brief amici curiae of Colorado, et al. filed.
Jul 1 2005	Extension of time within which to file respondent's brief on the merits to and including August 19, 2005.
Jul 20 2005	SET FOR ARGUMENT on November 8, 2005.
Jul 26 2005	Further extension of time within which to file respondent's brief on the merits to and including September 1, 2005
Sep 1 2005	Brief of respondent Scott Fitz Randolph filed.
Sep 1 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 16 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 16 2005	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 3 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Oct 6 2005	Reply of petitioner Georgia filed. (Distributed).
Oct 11 2005	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument

DENIED.

Oct 18 2005 Record received from Supreme Court of Georgia. (1 box)

Nov 8 2005 Argued. For petitioner: Paula K. Smith, Senior Assistant Attorney General, Atlanta, Ga.; and Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C., (for United States, as amicus curiae.) For respondent: Thomas C. Goldstein, Washington, D.C.

Supreme Court, U.S.
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No. 041067

In The
Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to resolve the conflict among federal and state courts on whether an occupant may give law enforcement valid consent to search the common areas of the premises shared with another, even though the other occupant is present and objects to the search?

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STATUTES

28 U.S.C. § 1257 1

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Georgia, respectfully prays that a writ of certiorari issue to review the judgment of the Georgia Supreme Court, which adopts the view of the minority of courts which have addressed the fourth amendment consent to search issue. The Georgia Supreme Court held that one occupant of a shared premises cannot validly consent for police to search the common areas of that premises if the other occupant is present and objects to the search, though both occupants have equal status and equal access to the premises.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 278 Ga. 614, 604 S.E.2d 835 (2004) and is reprinted in the Appendix hereto, App. 1, infra.

The opinion of the Court of Appeals of Georgia is reported at 264 Ga. App. 396, 590 S.E.2d 834 (2003) and is reprinted in the Appendix hereto, App. 7 infra.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 8, 2004. The jurisdiction of this Court to review the judgment of the Georgia Supreme Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The fourth amendment to the United States Constitution provides:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent Scott Fitz Randolph (hereinafter "Respondent" or "Randolph") was indicted by the Sumter County, Georgia, grand jury on November 27, 2001, for possession of cocaine. Respondent moved to suppress the cocaine which had been seized in a search of the residence he shared with his wife, a search to which his wife had consented, as Respondent admitted in his motion to suppress, but for which he had denied permission. Respondent claimed that the search of the residence, over his objection, was illegal and violated his fourth amendment rights.

Evidence presented at the October 3, 2002, suppression hearing established that Respondent's wife called the local police department on the morning of July 6, 2001, and asked an officer to come to the Randolph residence about a domestic dispute with her husband. Although the couple had previously been separated, she had returned to the marital home two days before with Respondent's

consent, and she still had clothing and furniture at their marital abode.

Mrs. Randolph told the responding officers that Respondent had taken their child away. She also complained that Respondent had been using a lot of cocaine, which was causing financial and other problems for them. A few minutes later, Respondent returned to the home, told officers where he had taken their son and explained that he had taken the child because he was afraid his wife might take the child away to her family in Canada.

Officers then escorted Respondent's wife to the neighbor's home where they picked up the child and returned to the Randolph residence. Mrs. Randolph renewed her accusations about Respondent's cocaine use. She told officers that drugs were on the premises.

One officer asked Respondent if he could check the house, and Respondent said no. The officer then asked Mrs. Randolph if police could search the house, and not only did she say yes, but Mrs. Randolph led the officer upstairs to a bedroom in which the officer saw a cut piece of a drinking straw on top of a jar. The straw was coated with white residue, and the officer suspected it was used to ingest cocaine. The officer then went downstairs, reported what he had seen and went to his car to get an evidence bag.

When the officer returned from the car, Mrs. Randolph had withdrawn her consent. The officer then collected the items he had seen upstairs: the straw, a business card and some white residue, and took the evidence, as well as Respondent and his wife, to the police station. The officer then obtained a search warrant to

search the home further and seized 25 drug-related items during the subsequent search of the residence.

The trial court denied the motion to suppress in an order filed on October 17, 2002, specifically finding that Respondent's wife had "common authority to grant consent for police to search the marital home." (Oct. 2002 Order).

On November 26, 2002, the Court of Appeals of Georgia granted Respondent's request for an interlocutory appeal to review the trial court's ruling. (App. 8). On December 1, 2003, the appellate court reversed the trial court's ruling, finding in pertinent part that where one occupant consents but the other occupant is present and objects to a search of an equally and jointly occupied premises, police must defer to the objecting occupant's position; that a wife's consent to search the marital abode cannot not override her husband's prior objection to the search, as a contrary rule "threatens domestic tranquility"; and that Respondent's wife could not waive "his" right to be free from an unreasonable search and seizure. (App. 9-13).

The State successfully petitioned for review in the Georgia Supreme Court. (App. 1). That Court granted certiorari to decide "whether an occupant may give valid consent to search common areas of a premises shared by another occupant who is present and objects to the search." *Id.*

On November 8, 2004, the Georgia Supreme Court affirmed the judgment of the Court of Appeals, finding that where two persons have equal use and control of a premises, one occupant's consent to search the premises is not valid if the other occupant is present and objects to the warrantless search. (App. 1). The Georgia Supreme Court interpreted *United States v. Matlock*, 415 U.S. 164 (1974),

as holding that an occupant with common authority over a shared premises could give valid permission for a search of that premises only in the absence of the other occupant(s). (App. 2). The state appellate court further noted that this Court had never addressed the issue of consent where both occupants were present when police requested permission to search the shared premises, and one occupant consented to the search while the other objected. (App. 2). The state appellate court concluded that police must obtain all occupants' consent before a search may occur in order to protect all individuals' fourth amendment rights. (App. 3).

The dissent interpreted *Matlock* as holding that the third-party consent rule applies even if the subject of the search is present and objects to the search, noting that the majority of Georgia's highest court had adopted "the minority view on this issue." (App. 4). The dissent declined to adopt a rule which turned on the presence or absence of other occupants, but would instead adopt a rule which looked to whether a third party who had common authority over the shared premises "would permit inspection in his own right." (App. 5-6).

The State's motion to stay the remittitur was granted on November 23, 2004.

The State now seeks review of the decision of the Georgia Supreme Court and an answer to the conflict among the courts who have addressed the consent issue. The State seeks a "bright-line" rule on whether police must obtain the consent of all occupants present when a warrantless search of jointly occupied premises is

requested or whether the consent of one occupant with common authority over the premises is sufficient.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT ON WHETHER ONE OCCUPANT MAY VALIDLY CONSENT TO A SEARCH OF A JOINTLY-OCCUPIED PREMISES IF ANOTHER OCCUPANT IS PRESENT AND OBJECTS TO THE SEARCH.

"[T]he search of property, without warrant and without probable cause, but with proper consent, is valid under the Fourth Amendment." *United States v. Matlock*, 415 U.S. at 165-66. Such consent may be obtained "either from the individual whose property is searched . . . , or from a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Matlock*, 415 U.S., at 171).

Cases dealing with third-party consent searches make clear that the prosecution:

> [M]ay show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Matlock, 415 U.S. at 171. This "common authority" is not derived from property law but:

> [R]ests rather on mutual use of the property by persons generally having joint access or control

> for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171, n.7.

The question of consent is to be judged against "an objective standard," looking at whether all the facts available to the officer at the moment would warrant a man of reasonable caution to believe that the consenting party had authority over the premises. *Illinois v. Rodriguez*, 497 U.S. at 188.

There is currently a conflict among federal and state courts on whether police may obtain valid consent to search from one occupant with common authority over shared premises in the face of another occupant's presence and objection to the search. The majority of courts who have addressed this issue have interpreted *Matlock* as permitting police to conduct a warrantless search with one cohabitant's consent even when the subject of the search is present and objects. *See, e.g., United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Baldwin*, 644 F.2d 381, 383 (5th Cir. Unit A 1981); *United States v. Sumlin*, 567 F.2d 684, 687 (6th Cir. 1977); *United States v. Aghedo*, 159 F.3d 308 (7th Cir. 1998); *United States v. Morning*, 64 F.3d 531 (9th Cir. 1995); *United States v. McAlpine*, 919 F.2d 1461 (10th Cir. 1990); *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995); *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979); *United States v. Garcia*, 57 M.J. 716 (2002); *Love v. State*, 138 S.W.3d 676 (Ark. 2003); *People v. Haskett*, 640 P.2d 776, 785 (Cal. 1982); *People v. Sanders*, 904 P.2d 1311 (Col. 1995) (en

banc); *People v. Callaway*, 522 N.E.2d 337 (Ill. App. 1988); *In re Anthony F.*, 442 A.2d 975 (Md. 1982); *Commonwealth v. Ploude*, 688 N.E.2d 1028 (Mass. App. Ct. 1998); *State v. Ramold*, 511 N.W.2d 789 (Neb. Ct. App. 1994); *State v. Santana*, 521 A.2d 346 (N.J. Super. Ct. 1987); *People v. Cosme*, 397 N.E.2d 1319 (N.Y. 1979); *State v. Zimmerman*, 529 N.W.2d 171 (N.D. 1995); *State v. Frame*, 609 P.2d 830 (Or. Ct. App. 1980); *Laramie v. Hysong*, 808 P.2d 199 (Wyo. 1991).

In contrast, three other states ruled similarly to the Georgia Supreme Court in this case, holding that if a cohabitant is present and can object, police should also obtain that cohabitant's consent before a search may ensue. *See Silva v. State*, 344 So.2d 559 (Fla. 1977); *In re D.A.G.*, 484 N.W.2d 787 (Minn. 1992); *State v. Leach*, 782 P.2d 1035 (Wash. 1989). The rationale in those cases is that, by being present, the occupant has not assumed that a third party will vicariously waive his or her fourth amendment rights.

The flaw in that analysis is that in *Matlock*, the defendant was present, having been arrested in the front yard of the residence, and police obtained consent from a third party inside the residence. *Matlock*, 415 U.S. at 171. This Court did not require law enforcement to obtain the defendant's consent to search as well. Instead, this Court looked to whether the third party had common authority over the premises in order to grant consent.

Here, law enforcement obtained valid consent from Respondent's wife, whom the trial court found to have common authority over the home, to search the couple's marital home. However, because Respondent was also present and objected to the search, the Georgia Supreme

Court held that Respondent's objection trumped his wife's consent, thereby extinguishing her ability to permit inspection of her own home in her own right.

The State urges this Court to grant certiorari to resolve this conflict among the state and federal courts on this important issue of consent. Otherwise, Georgia citizens will be left with a rule which, in application, turns upon the timing of a request to search. For example, had Respondent left the home before the officer asked to search the home or left after he refused the officer's request to check the house, the officer could have obtained consent to search from Respondent's wife, the only occupant present. Thus, the timing of a request should not control.

More importantly, the rule adopted in this case focuses arbitrarily on the rights of the objecting occupant, to the detriment of the consenting occupant who was trying to report a crime and who had just as much access and control over the home as her husband. The rule in this case turns on the irrelevant consideration of presence, rather than authority over common areas of a shared premises. The Court should grant certiorari to consider the impact and viability of such a rule.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the State of Georgia prays that this Court grant a writ of certiorari to review the decision of the Georgia Supreme Court as the decision presents a question of paramount

importance not previously decided by this Court and on which the states are in conflict.

Respectfully submitted,

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In the Supreme Court of Georgia

S04G0674. THE STATE v. RANDOLPH.

BENHAM, Justice.

The Court of Appeals granted an interlocutory appeal to review the trial court's denial of defendant Scott Fitz Randolph's motion to suppress evidence seized from his home in a warrantless search conducted by law enforcement officers pursuant to permission given by Randolph's wife in Randolph's presence after Randolph had refused to give the officers permission to search. The Court of Appeals determined the motion to suppress should have been granted. *Randolph v. State,* 264 Ga. App. 396(1), (590 SE2d 834) (2003). We granted the State's petition for a writ of certiorari to decide whether an occupant may give valid consent to search common areas of a premises shared by another occupant who is present and objects to the search. Inasmuch as we are faced with a situation in which two persons have equal use and control of the premises to be searched, we conclude the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search. Accordingly, we affirm the judgment of the Court of Appeals.

> The Fourth Amendment [to the U.S. Constitution] generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. [Cits.]. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched [cit.], or from a third party who possesses common

> authority over the premises, see *United States v. Matlock,* [415 U.S. 164,] 171 [(94 SC 988, 39 LE2d 242) (1974)].

Illinois v. Rodriguez, 497 U.S. 177, 181 (110 SC 2793, 111 LEd2d 148) (1990). In *United States v. Matlock,* supra, 415 U.S. at 170, the U.S. Supreme Court noted a clear indication in case law that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." Both this Court and the Court of Appeals of Georgia have rejected legal challenges to warrantless searches conducted with the consent of a person who shared with the defendant common control and authority over the area searched. See, e.g., *Presnell v. State,* 274 Ga. 246(8) (551 SE2d 723) (2001); *Smith v. State,* 264 Ga. 87(2) (441 SE2d 241) (1994); *Walsh v. State,* 236 Ga. App. 558(2) (512 SE2d 408) (1999); *Valenzuela v. State,* 157 Ga. App. 247(1) (277 SE2d 56) (1981). The basis for the decisions in these cases was the recognition that "any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock,* supra, 415 U.S. at 171, n. 7.

In neither *Matlock* nor any of the Georgia cases cited above, however, were law enforcement officers faced with the physical presence of joint occupants, with one consenting to the search and the other objecting.[1] While one co-inhabitant may have assumed the risk that a second co-inhabitant will consent to a search of common areas in the

[1] A noted commentator has observed that such a case has rarely reached the appellate courts. 3 LaFave, *Search and Seizure,* § 8.3(d), p. 730 (3rd ed. 1996).

absence of the first co-inhabitant (*United States v. Matlock,* supra, 415 U.S. at 170), the risk assumed by joint occupancy goes no further – the risk "is merely an inability to control access to the premises during one's absence." 3 LaFave, Search and Seizure, § 8.3(d), p. 731 (3rd ed. 1996). See also *In the Matter and Welfare of D.A.G.,* 484 NW2d 787, 789 (Minn. 1992). While a co-inhabitant has authority to consent to a search of joint premises, "a present, objecting party should not have his constitutional rights ignored . . . [due to a] property interest shared with another." *Silva v. State,* 344 S2d 559, 562 (Fla. 1977). We agree with the Supreme Court of Washington, which concluded in *State v. Leach,* 113 Wn.2d 735, 744 (782 P2d 1035, 1040) (Wash. 1989):

> Where the police have obtained consent to search from an individual possessing, at best, equal control over the premises, that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent. However, should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent. Any other rule exalts expediency over an individual's Fourth Amendment guaranties.

Accordingly, we affirm the judgment of the Court of Appeals which reversed the trial court's denial of Randolph's motion to suppress.

Judgment affirmed. All the Justices concur, except Hunstein, Carley, and Hines, JJ., who dissent.

HUNSTEIN, Justice, dissenting.

We granted certiorari in this case in order to address the admissibility of evidence seized during a warrantless

search where a person with shared authority to grant consent to search does so despite the objection of the subject of the search. Ignoring the nearly uniform interpretation of *United States v. Matlock*, 415 U.S. 164(II) (94 SC 988, 39 LEd2d 242) (1974),[2] that the third-party consent rule applies even when a present subject of the search objects, the majority has chosen to follow a ruling that expresses the minority view on this issue.[3] Because I believe the rule announced in *State v. Leach*, 782 P2d 1035 (Wash. 1989), that any co-occupant's opposition to the search can vitiate the express consent of another co-occupant with common authority over the premises, represents an unjustified break with Georgia case law, I must dissent.

The majority acknowledges that consent is a well-recognized exception to the warrant requirement of the Fourth Amendment, see *Illinois v. Rodriguez*, 497 U.S. 177(II) (110 SC 2793, 111 LEd2d 148) (1990), and that a

[2] See e.g., *United States v. Shelton*, 337 F3d 529 (5th Cir. 2003); *United States v. Aghedo*, 159 F3d 308(II)(A) (7th Cir. 1998) (co-occupant's access and control of room gives defendant reduced expectation of privacy in premises or shared items); *United States v. Canada*, 527 F2d 1374, 1379 (9th Cir. 1976); *United States v. Morning*, 64 F3d 531 (9th Cir. 1995) (valid consent of person with common authority justifies search although co-occupant physically present and objects); *Lenz v. Winburn*, 51 F3d 1540, 1548 (11th Cir. 1995) (*Matlock* third-party consent rule "applies even when a present subject of the search objects"); *United States v. Donlin*, 982 F2d 31(I) (1st Cir. 1992) (third-party consent remains valid even when defendant specifically objects); *United States v. McAlpine*, 919 F2d 1461 (10th Cir. 1990); *United States v. Bethea*, 598 F2d 331, 335 (4th Cir. 1979) (by sharing common area defendant assumed risk co-occupant might consent to search even when he, himself, was present).

[3] See *State v. Leach*, 782 P2d 1035 (Wash. 1989); *Silva v. State*, 344 S2d 559 (Fla. 1977).

warrantless search without probable cause does not violate the Fourth Amendment if the authorities have obtained the voluntary consent of a person authorized to grant such consent. See *United States v. Matlock*, supra; *United States v. Elliott*, 50 F3d 180(II) (2d Cir. 1995). It also acknowledges that Georgia has long relied on the *Matlock* rule by correctly stating that our courts have consistently "rejected legal challenges to warrantless searches conducted with the consent of a person who shared with the defendant common control and authority over the area searched." Majority p. 614. Nevertheless, even though the facts of this case clearly establish the authority of Randolph's wife to consent to search of their shared home and bedroom and that Randolph as the joint occupant of the home assumed the risk that his wife would expose their common private areas to such a search, the majority ignores the approach sanctioned by numerous federal and state courts and unpersuasively cites to only a few cases and a general treatise on criminal law to conclude that a challenge to a search is not fully resolved by proof of effective consent when *any* co-occupant is present and protests. In my opinion the majority's claim of unconstitutionality of the search based on express refusal is not more viable than a claim based on lack of express consent. Under *Matlock* the co-occupant that expressly refuses to give consent to search does not enjoy a greater expectation of privacy because in sharing the property the co-occupant assumed the risk that another would consent to a search. *United States v. Sumlin*, 567 F2d 684, 687-688 (6th Cir. 1977).

I would not hold the express refusal of one co-occupant to be paramount. Instead, I would embrace the principles recognized in *Matlock* to look not to the defendant's

presence or absence but to whether or not he assumed the risk that the third party who possessed common authority over the premises would permit inspection in his own right. In my view, Randolph assumed the risk that because of his diminished expectation of privacy he had in the home he shared with his wife, she would "expos[e] their common private area [] to such a search," *United States v. Sumlin*, supra, and that his opposition to the presence of police in his home would not override his wife's consent. I would conclude that even though Randolph was present and objected, once Randolph's wife gave valid consent to the search of the home she shared with Randolph, that was sufficient to authorize the search. Accordingly, I would reverse the Court of Appeals and affirm the decision of the trial court on this evidentiary issue.

I am authorized to state that Justice Carley and Justice Hines join in this dissent.

DECIDED NOVEMBER 8, 2004.

Certiorari to the Court of Appeals of Georgia – 264 Ga. App. 396.

Cecilia M. Cooper, District Attorney, Richard E. Thomas, Assistant District Attorney, for appellant.

Collier & Gamble, Wilbur T. Gamble III, for appellee.

In the Court of Appeals of Georgia

A03A0906. RANDOLPH v. THE STATE.

RUFFIN, Presiding Judge.

This case addresses the critical issue of the authority of police officers to conduct a warrantless search of a marital residence when, after one spouse refuses, the other spouse grants consent to search the home. Does the latter's consent supersede the first spouse's objection? The trial court concluded that it did, and it denied a motion to suppress. For reasons that follow, we disagree with the trial court and thus reverse.

The material facts are not in dispute. Scott Randolph and his wife were having marital problems and separated in late May 2001. Mrs. Randolph took a great deal of her clothing and went with their son to her parents' home in Canada. Mr. Randolph continued to reside at the marital residence in Americus, Georgia. On or about July 4, 2001, Mrs. Randolph and the child returned to their house in Americus.

On July 6, 2001, Mrs. Randolph reported a domestic disturbance, and the police responded at around 9:00 a.m. When the officers arrived, Mrs. Randolph appeared very upset and complained that her husband had taken their child away from the house. She also accused Mr. Randolph of using large amounts of cocaine, thereby causing financial problems for the family. Shortly thereafter, Mr. Randolph returned to the house without the child. He explained that he had taken the child to a neighbor's house because he was concerned that his wife was going to

leave the country with the child again. He also accused his wife of being highly inebriated and an alcoholic. Sergeant Brett Murray accompanied Mrs. Randolph to the neighbor's house to retrieve the child.

After they returned to the Randolph residence, Murray confronted Mr. Randolph about his wife's allegations concerning his cocaine use and asked for consent to search the residence. When Mr. Randolph responded with an unequivocal "no," Murray turned to Mrs. Randolph and asked for her consent. Readily agreeing to the search, Mrs. Randolph took Murray to an upstairs bedroom. Peering in the doorway, the officer observed a "piece of cut straw" on a dresser in the room. Upon closer examination, the officer observed some white residue on the straw, which he believed had been used for ingesting cocaine.

Murray collected an evidence bag and called the district attorney's office. Upon reaching the district attorney's office, he was instructed to stop the search and obtain a warrant. Mrs. Randolph then informed him that she was withdrawing her consent to search the house.

Murray, accompanied by the Randolphs, then took the straw and residue to the police station and obtained a warrant to search the house. During the ensuing search, numerous drug-related items were seized. Ultimately, an indictment was returned charging Mr. Randolph with possession of cocaine. He moved to suppress evidence of the drugs, claiming that search of the residence over his express objection violated his Fourth Amendment rights. The trial court denied the motion, and we granted Mr. Randolph's application for interlocutory appeal.

1. It is well established that "the consent of one who possesses common authority over premises or effects is

valid as against the absent nonconsenting person with whom that authority is shared."[1] This is so because it is *reasonable* to expect that a co-habitant with the authority to give such consent might, in fact, exercise that authority.[2] And the touchstone of Fourth Amendment jurisprudence is reasonableness.[3]

We are now presented with the question of whether it is reasonable for one occupant to believe that his stated desire for privacy will be honored, even if there is another occupant who could consent to a search. Notably, neither our Supreme Court nor the United States Supreme Court has addressed the precise issue before us, although *United States v. Matlock*[4] is exceedingly close. However, at least one jurisdiction has concluded that it is reasonable for an occupant to believe his wishes will be honored as, "'ordinarily, persons with equal rights in a place would accommodate each other by not admitting persons over another's objection while he was present.'"[5] Indeed, if one person with equal rights in a place refuses to honor a co-occupant's objection, such refusal hints of underlying trouble in the relationship and should raise a question as

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[1] *United States v. Matlock*, 415 U.S. 164, 170 (94 SC 988, 39 LE2d 242) (1974).

[2] Id. at 171, n. 7.

[3] See *Padron v. State*, 254 Ga. App. 265, 268(1) (562 SE2d 244) (2002).

[4] Supra.

[5] (Punctuation omitted.) *State v. Leach*, 113 Wash.2d 735, 739-741 (782 P2d 1035) (1989). (quoting 3 W. LaFave, Search and Seizure).

to why consent was given.[6] Accordingly, we find this reasoning persuasive.

Moreover, we find it inherently reasonable that police honor a present occupant's express objection to a search of his dwelling, shared or otherwise. One who grants consent to search may subsequently withdraw such consent, thereby terminating law enforcement officers' authority to search.[7] Inherent in the power to grant consent is the power to vitiate that consent. Who, then, may terminate the search? Is it limited to the consenting co-occupant? Or, may an objecting co-occupant exercise his competing right to be free from the search? We believe the answer to this last question is an unequivocal "yes." If "common authority" is the basis for allowing one co-occupant to consent to a search on behalf of all occupants, it seems reasonable that "common authority" should permit a co-occupant to exercise privacy rights on behalf of all occupants.

Such result is particularly reasonable in this case, which also involves a marital dispute. When possible, Georgia courts strive to promote the sanctity of marriage and to avoid circumstances that create adversity between

[6] The facts of this case illustrate the problem with dueling responses to a request for consent to search. The Randolphs were clearly at odds, hurling accusations of wrongdoing at one another. Thus Mrs. Randolph's motive for consenting to the search in the face of her husband's refusal is troubling. Under these circumstances, it is preferable that a neutral magistrate determine whether Mrs. Randolph's accusations were founded or whether they stemmed from the ongoing altercation.

[7] See *Montero v. State*, 245 Ga. App. 181, 184 (537 SE2d 429) (2000) (defendant "was as free to withdraw his consent to search . . . as he was not to give such consent in the first place").

spouses.[8] Allowing a wife's consent to search to override her husband's previous assertion of his right to privacy threatens domestic tranquility.[9]

In resolving this issue, Judge Phipps' special concurrence favors a case-by-case analysis. However, it is incumbent upon this Court to provide as much guidance as practicable to those officers confronted with the daily task of balancing citizens' Fourth Amendment privacy interests against the officers' duty to investigate crime. And a bright-line rule requiring police to obtain a warrant in the face of competing responses to requests for consent provides a clear guideline for law enforcement. Such rule should not unduly hamper law enforcement, as generally a warrant is the rule rather than the exception.

The cases the special concurrence cites to support a case-by-case analysis are not persuasive. In several of those cases, the victim was in imminent danger, and the exigent circumstances exception likely would permit a warrantless search.[10] And if there is no imminent danger, a law enforcement officer should be required to obtain a warrant.

[8] See *Robeson v. Intl. Indem. Co.*, 248 Ga. 306, 308-309(3) (282 SE2d 896) (1981) (policy rationale supporting interspousal tort immunity doctrine).

[9] Granted, the Randolphs appear to have a dearth of marital harmony. However, the fact that Mrs. Randolph subsequently withdrew her consent to search suggests that the relationship may not have been entirely acrimonious.

[10] See *Lawler v. State*, 276 Ga. 229, 233(4)(b) (576 SE2d 841) (2003) ("[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal").

The dissent, with verbal ease, but without verbal economy, is not persuasive either. Although the dissent accuses the Court of misconstruing *Matlock* and "conflat[ing] two factors" in Fourth Amendment jurisprudence – an individual's waiver of privacy and the subsequent effect of such waiver – such is not so. To the contrary, it is the dissent that has misconstrued *Matlock*, expanding it in a manner that is inconsistent with the Fourth Amendment. This case is both legally and factually distinguishable from *Matlock*.[11] Here, Mr. Randolph was not only present, but he affirmatively exercised his Fourth Amendment right to be free from police intrusion by refusing to consent to the search of his house. We should first assess the right asserted before concluding that the right has been waived.

According to our interpretation – one that is consistent with Fourth Amendment principles – *Matlock* and its progeny stand for the proposition that, in the absence of evidence to the contrary, there is a presumption that a co-occupant has waived his right of privacy as to other co-occupants. However, when police are confronted with an unequivocal assertion of that co-occupant's Fourth Amendment right, such presumption cannot stand. After all, the right involved is the right to be free from police

[11] Furthermore, I am unpersuaded that we are bound in this case by federal law. Randolph raised both federal and Georgia constitutional grounds in his motion to suppress. Assuming, for the sake of argument, that federal law dictates the result advocated by the dissent, it does not automatically follow that Georgia law requires the same result. See *Powell v. State*, 270 Ga. 327, 330(3) (510 SE2d 18) (1998) ("the 'right to be let alone' guaranteed by the Georgia Constitution is *far more extensive* tha[n] the right of privacy protected by the U.S. Constitution") (emphasis supplied).

intrusion, not the right to invite police into one's home. Thus, the issue is not Mrs. Randolph's right to consent to a search, but whether she may waive her husband's right to be free from the search. Given Mr. Randolph's unequivocal assertion of that right, it seems disingenuous to conclude that he waived it.

We are not the first Court to reach this result, despite the dissent's suggestion to the contrary.[12] As artfully stated by a Florida court,

> if the Fourth Amendment means anything, it means that the police may not undertake a warrantless search of defendant's property after he has expressly denied his consent to such a search. Constitutional rights may not be defeated by the expedient of soliciting several persons successively until the sought-after consent is obtained.[13]

Nonetheless, the dissent's position has its allure: if a co-occupant has assumed the risk that another co-occupant will permit a search of an area, he no longer has a reasonable expectation of privacy in that area. But the risk assumed by a co-occupant is that, in the absence of

[12] See *Leach*, supra; *Silva v. State*, 344 S2d 559 (Fla. 1977); *Smith v. State*, 465 S2d 603 (Fla. App. 1985); *In the Matter of the Welfare of D.A.G.*, 484 NW2d 787 (Minn. 1992) (although several of these cases have been questioned, legal research shows that the cases retain precedential value. Moreover, the cases serve to illustrate that there is, in fact, a split of authority as to how *Matlock* should be interpreted).

[13] (Punctuation omitted.) *Lawton v. State*, 320 S2d 463, 465 (Fla. App. 1975).

evidence to the contrary, the other co-occupant might grant consent to search.[14]

The dissent, passionate it [sic] its quest, poignant in its resolve, and even practicable in its approach, peers myopically at the problem presented. This Court should not read the Fourth Amendment from a perspective of impoverishment, but from the vantage point of proper respect for a fundamental right. The type of seemingly innocuous encroachment advocated by the dissent is that which the United States Supreme Court alluded to when it wrote:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[15]

Given our charge to construe the Fourth Amendment expansively, we conclude that Mr. Randolph's exercise of his Fourth Amendment right should be honored.

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[14] See *Matlock*, supra at 170.

[15] (Punctuation omitted.) *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (91 SC 2022, 29 LE2d 564) (1971).

2. On appeal, the State argues that even if Mrs. Randolph lacked authority to consent, the search was nonetheless valid. Citing *Illinois v. Rodriguez*,[16] the State contends that the search was permissible because the police had a good faith belief that Mrs. Randolph had authority.

In *Illinois v. Rodriguez*, the defendant had severely beaten his girlfriend. She went to her mother's home and summoned the police. She then took the police to the defendant's apartment, told them that she lived there with him, unlocked the door with a key, and gave them permission to enter. Unbeknownst to the police, the girlfriend had in fact moved out of the apartment several weeks earlier. The Supreme Court nonetheless held the warrantless entry valid, because it was based upon the consent of a third party whom the police reasonably believed to possess common authority over the premises. *Rodriguez* is distinguishable, because the police here knew the facts before conducting the search.

Although the United States Supreme Court adopted a "good faith" exception to the exclusionary rule of the Fourth Amendment in *United States v. Leon*,[17] the Supreme Court of Georgia later concluded in *Gary v. State*[18] that in Georgia a defendant's statutory right to exclusion of evidence has no "good faith" exception. Therefore, consistent with both *Rodriguez* and *Gary*, we must determine the validity of the search based on the facts known to the officer at the time of the search. If we conclude from

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[16] 497 U.S. 177 (110 SC 2793, 111 LE2d 148) (1990).

[17] 468 U.S. 897 (104 SC 3405, 82 LE2d 677) (1984).

[18] 262 Ga. 573 (422 SE2d 426) (1992).

those facts that the search was not valid, we cannot uphold it on grounds that, under the facts, the officer may have drawn a good faith legal conclusion contrary to our own.

3. The State also argues that even if the warrantless search was invalid, the evidence was admissible under either the "independent source" exception or the "inevitable discovery" exception to the exclusionary rule.

The independent source doctrine stems from *Murray v. United States.*[19] In that case, several law enforcement agents conducted an illegal search of a warehouse and observed but did not seize evidence that was in plain view. The agents later obtained a warrant to search the warehouse. In obtaining the warrant, they neither mentioned the prior illegal entry nor relied on any observations made during the entry. In execution of the warrant, the agents then seized the evidence they had observed earlier. The Supreme Court held that suppression of the evidence was not required if the government could establish that the warrant was in fact a genuinely independent source for its discovery.[20] *Murray* is distinguishable because the State has not shown that it established probable cause for issuance of the warrant in this case independently of facts revealed by the unlawful search. "The admissibility of [evidence] under the 'independent source' exception depends on whether authorities established probable cause to seize the [evidence], either before or after the illegal

[19] 487 U.S. 533 (108 SC 2529, 101 LE2d 472) (1988).

[20] *Price v. State*, 270 Ga. 619, 622-623(2) (513 SE2d 483) (1999).

search, independent of any facts revealed by the unlawful search. [Cits.]"[21]

Under the inevitable discovery doctrine, the State must show (1) that evidence derived from police error or illegality would have been ultimately or inevitably discovered by lawful means, and (2) that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct.[22] Given the State's failure to show that the evidence would have ultimately been discovered, this argument lacks merit.

Judgment reversed. Smith, C. J., Miller and Ellington, JJ., concur and concur specially. Phipps, J., concurs specially. Andrews, P. J., and Blackburn, P. J., dissent.

ELLINGTON, Judge, concurring specially.

I concur fully in the majority opinion. As illustrated by the several opinions in this case, this is an unsettled area of the law in Georgia and across the nation. Like the majority, I favor the adoption of a bright-line rule precluding police officers from conducting a warrantless search if any co-occupant of the premises at issue is present and communicates an objection to the officers. I write separately to add that I believe such a rule is necessary to protect the right to privacy while at the same time giving clear direction to law enforcement. I believe the right to privacy demands that, in close calls, we adhere closely to the general principle that warrantless searches are per se unreasonable and unconstitutional. Exigency and consent,

[21] *Waldrip v. State*, 267 Ga. 739, 750-751(18) (482 SE2d 299) (1997).

[22] *Taylor v. State*, 274 Ga. 269, 274(3) (553 SE2d 598) (2001).

as exceptions to this general rule, should be drawn as narrowly as possible. When one co-occupant consents, the law allows police officers to presume all other (absent or silent) co-occupants had no expectation of privacy. But where a co-occupant is present and objecting, any *presumption* of a lack of an expectation of privacy should yield to that affirmative *assertion* of the right to be free of warrantless searches. I believe we unreasonably burden law enforcement officers when we require them to stake the later admissibility of any evidence seized on their ability to immediately and fully divine a consenter's relationship to the premises and to the objecting co-occupant as well as the consenter's motives in giving consent to search.

I am authorized to state that Chief Judge Smith and Judge Miller join in this special concurrence.

PHIPPS, Judge, concurring specially.

Although I wholeheartedly agree with the reversal of the trial court's denial of Randolph's motion to suppress, I think that the bright-line approach adopted by the majority misconstrues the guiding decision of the United States Supreme Court in *United States v. Matlock*,[23] loses sight of the overall reasonableness requirement of the Fourth Amendment, is not required in order to provide reasonably clear guidance to law enforcement, and holds the potential for unduly hampering police.

1. "The Fourth Amendment to the United States Constitution protects the 'right of the people to be secure in their persons, houses, papers, and effects, against

[23] 415 U.S. 164 (94 SC 988, 39 LE2d 242) (1974).

unreasonable searches and seizures' and requires that search warrants be supported by probable cause."[24]

I cannot agree with the bright-line rule adopted by the majority, primarily because

> [t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. The determination of fourth-amendment reasonableness requires consideration of the totality of circumstances in a particular case, weighing all of the factors suggesting constitutional violation against all of those indicating validity.[25]

In *United States v. Matlock*,[26] the defendant jointly occupied a residence with a woman. The police arrested the defendant in the front yard without asking him for permission to search the residence. Instead, the police asked his housemate and she consented. Holding the one joint occupant's voluntary consent to search the premises to be valid against the co-occupant, the Supreme Court in *Matlock* crafted the following rule:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed

[24] *Stanford v. State*, 251 Ga. App. 87, 89(1) (553 SE2d 622) (2001).

[25] (Citations and punctuation omitted.) *City of East Point v. Smith*, 258 Ga. 111, 112(1) (365 SE2d 432) (1988).

[26] Supra.

> common authority over or other sufficient relationship to the premises or effects sought to be inspected.[27]

In a footnote, the Court then explained that

> [c]ommon authority is . . . not to be implied from the mere property interest a third party has in the property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[28]

The majority interprets *Matlock* as standing "for the proposition that, in the absence of evidence to the contrary, there is a presumption that a co-occupant has waived his right of privacy as to other co-occupants." *Matlock*, however, by its express terms holds that co-occupants have "assumed the risk" that one of their number might permit the common area to be searched. *Matlock* says nothing whatsoever about any "presumed" waiver of privacy as to other co-occupants. I would think that the presumption would be that an individual who has probably committed a crime would not consent to a search of his property. Moreover, it would seem that if the Court in *Matlock* had intended to give a present co-occupant an automatic veto

[27] Id. at 171; *Atkins v. State*, 254 Ga. 641, 642 (331 SE2d 597) (1985).

[28] *Matlock*, supra at 171, n. 7; *Smith v. State*, 264 Ga. 87, 88(2) (441 SE2d 241) (1994); see *State v. West*, 237 Ga. App. 185 (514 SE2d 257) (1999).

over another co-occupant's consent, as held by the majority, it would have required the police to ask the defendant in that case whether he objected to the search.

In reliance on a line of cases exemplified by *May v. State*[29] and *State v. Gonzalez-Valle*,[30] Randolph asks us to establish the bright-line rule which the majority has adopted. In support of another bright-line rule allowing one occupant to give a valid consent to a search of jointly occupied or controlled property even where the other occupant refuses to consent or objects to the search, the State cites such cases as *People v. Sanders*,[31] *City of Laramie v. Hysong*,[32] *United States v. McAlpine*,[33] and *People v. Haskett*.[34]

I cannot agree with either extreme. A broad rule precluding the police from conducting a warrantless search if both spouses or co-occupants are present and one objects is premised on a reading of the Fourth Amendment as prohibiting police from undertaking a warrantless search of a person's property if such person expressly denies his consent to such a search.[35] This, in my opinion, is a misinterpretation of the constitutional text. By its terms, the Fourth Amendment does not require a warrant to search premises in the absence of consent. Rather, what the Fourth Amendment requires is that warrants be

[29] 780 SW2d 866 (Tex. App. 1989).

[30] 385 S2d 681 (Fla. App. 1980).

[31] 904 P2d 1311 (Colo. 1995).

[32] 808 P2d 199 (Wyo. 1991).

[33] 919 F2d 1461 (10th Cir. 1990).

[34] 30 Cal.3d 841 (640 P2d 776) (1982).

[35] See *Lawton v. State*, 320 S2d 463, 465 (Fla. App. 1975).

supported by probable cause. What the Fourth Amendment prohibits is unreasonable searches.

A bright-line rule requiring the police to obtain a warrant anytime a spouse or co-occupant is present on the premises and voices an objection to the search loses sight of the overall reasonableness requirement of the Fourth Amendment and might have precluded the search in a case like *Sanders*. In that case, a woman complained that during an argument with the man with whom she lived, he had physically assaulted her, threatened to kill her, and fired a rifle into the back window of her truck as she fled. She showed the police the truck, told them they might find the defendant at their home, and gave her consent to a search of the home. The court held that the fact that the defendant was present when the police searched the residence and did not consent to the search did not vitiate the absent co-occupant's consent. I agree with *Sanders*, for reasons given in *McAlpine*. In *McAlpine*, police received a telephone call from a woman who reported that she was being held against her will and threatened with guns by two men who had been sexually assaulting her. The responding officers went to the residence and were admitted by the woman. She told one of the officers that she regularly slept in one of the bedrooms and had personal property scattered throughout the residence. The court held that the woman was qualified to give effective consent to search the premises, holding that crime victims who cohabit with their abusers are entitled to give consent to a search in their own rights.

In *Hysong*, the husband was a suspect in a recently reported incident of child abuse outside the home. When a police officer arrived at his house, his wife let them enter and check the child's condition over her husband's objection.

Under those "exigent circumstances,"[36] the officer's warrantless entry into the house with the consent of one spouse was properly held legal even though the other spouse was present and objected. In *Haskett*, police arrested the defendant at his home after his sister reported that he had raped and stabbed her, and murdered her two sons, at her home. The defendant's wife consented to the officers' request that they be allowed to enter the house. According to the defendant, one of the officers asked for his consent, but he refused to give it. Although the "exigent circumstances" exception to the Fourth Amendment's warrant requirement was not applicable in *Haskett*, the court properly refused to adopt a rule vitiating the consent of one co-occupant when the other is present and protests the entry or search where the police officers had fresh evidence that the defendant had committed several violent crimes.

Although I, therefore, must reject the bright-line rule suggested by Randolph and adopted by the majority, I similarly cannot agree with an unqualified rule, such as that urged by the State, allowing one spouse or occupant to give a valid consent to a search of jointly occupied premises even though the other objects. In *May*, after the defendant's wife moved out of their residence but before their divorce, she arranged for the police to gain entry to the home and search it while the defendant was away. Under those facts, the court held that although the wife retained a community property interest in the residence and a key to it, she had no right to consent to a warrantless search of the house because her husband's personal

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[36] *Hysong*, supra at 204-205.

privacy interest was superior to her property interest. Similarly, in *Gonzalez-Valle*, a husband and wife were having marital difficulties, and she was angry and jealous over his affair with another woman. As a result, she informed the police that her husband had a gun and some narcotics in his possession. She met them at her home and consented to a warrantless search of the bedroom occupied by her husband. Under those circumstances, the court held that the wife had no right to waive her husband's protection against unreasonable searches and seizures.

This case is closer to *May* and *Gonzalez-Valle* than to *Sanders*, *Hysong*, *McAlpine*, and *Haskett*. Here, the wife summoned the police to the marital residence because, upon her return after being separated from her husband, he had spirited their child away. Her complaint was resolved when the child was safely returned to the residence. At that point, the police were faced with cross-accusations by bickering spouses. According to the husband, the wife was under the influence of alcohol. According to the wife, the husband was using illegal drugs. Testimony given by Sergeant Murray indicated that he could verify neither accusation. Consequently, the officer had no hard evidence that a crime had even been committed. Under those circumstances, the matter should have been submitted to a neutral and detached magistrate for a probable cause determination before the police searched Randolph's house over his objection.

The case-by-case analysis I propose provides the police with reasonably clear guidance. If there is some objective verification that a crime has been committed, the police may search the common areas of a residence with the consent of one occupant or spouse even if another co-occupant or spouse objects. If one co-occupant or spouse

simply summons the police to a residence and accuses his or her co-occupant or spouse of illegal conduct, the matter should be submitted to a neutral and detached magistrate if another co-occupant or spouse is present on the premises and objects. As always, in cases of doubt and in the absence of exigent circumstances, a warrant should be obtained.

In denying Randolph's motion to suppress, the trial court relied on *Kendrick v. State*.[37] In *Kendrick*, detectives were called to the scene of a robbery shortly after its occurrence and viewed a videotape of it. The detectives' investigation then led them to the defendant's house. They were admitted by his wife. When they encountered the defendant in the house, they recognized him as the robber depicted in the videotape. After questioning him, they arrested him. The defendant contended that the detectives' presence in his house at the time of his arrest was illegal because he had told them to leave. We held that the defendant was legally arrested during an entry into his home pursuant to the consent of his wife, who shared the house with him and thus had common authority over it. We found that the defendant, in fact, had not told the detectives to leave and that, in any event, only his wife could revoke her consent.

In *Kendrick*, the police were thus involved in the investigation of a robbery when events were fresh, and they entered the defendant's house with his wife's permission without objection by him and acquired probable cause for an arrest immediately upon seeing him. For these reasons, *Kendrick* is distinguishable from this case.

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[37] 211 Ga. App. 599, 600(2) (440 SE2d 53) (1993).

Matlock is controlling and, in my opinion, supports the conclusion that in this case the consent to the search by the one spouse was not valid against the objection of the other spouse who was also present on the premises.

2. Although I cannot agree with much of what is said in Division 1 of the majority opinion, I find the reasoning employed in Divisions 2 and 3 compelling, and I fully concur in those holdings.

BLACKBURN, Presiding Judge, dissenting.

Despite the binding authority of the United States Supreme Court's holding in *United States v. Matlock*,[38] and the persuasive authority of our federal courts interpreting *Matlock*, both the majority opinion and the special concurrences establish a contrary rule for Fourth Amendment issues in Georgia regarding consent searches to that established by the United States Supreme Court.

This Court, however, has no authority to either ignore or modify holdings of the United States Supreme Court regarding the interpretation of the Fourth Amendment of our Federal Constitution. This Court also lacks authority to create new search and seizure laws more restrictive of police activity than those issued by the United States Supreme Court, as that power is reserved for the Supreme Court of Georgia through interpretation of our State Constitution or the Georgia Legislature through passage of constitutional statutory law. This Court is not an arbiter of public policy, but a tribunal of laws bound by precedent. Because the majority and special concurrence in this case

[38] *United States v. Matlock*, 415 U.S. 164 (94 SC 988, 39 LE2d 242) (1974).

either misconstrue controlling precedent or exceed this Court's authority, I must respectfully dissent.

The present case is controlled by *Matlock*, which stands for the proposition "that if the state can establish that the third party shares an area with another more or less equally, that party's consent authorizes a search of the entire area regardless of the other person's proximity to, agreement with, or relationship with the third party." Whitebread and Slobogin, Criminal Procedure: An Analysis of Cases and Concepts 288 (4th ed. 2000). "*Matlock's* third-party consent rule applies even when a present subject of the search objects." *Lenz v. Winburn*.[39]

Here, the defendant's wife, with whom he shared his home equally, consented to a search of the home while the defendant, who was present, objected thereto. *Matlock* involved a consent to search given by Matlock's girlfriend, who was a co-occupant, while Matlock, who was present on the premises, was not asked for a consent to search. The United States Supreme Court approved the search, despite Matlock's presence. Under *Matlock*, the search here was proper, whether or not the defendant was present or objected to his wife's consent to the search.

This Court is absolutely bound to follow precedent set by the United States Supreme Court on federal constitutional questions. This case involves search and seizure issues under the Fourth Amendment. This Court cannot establish a more restrictive view of Fourth Amendment search and seizure law grounded in public policy aspirations. Where the Georgia Constitution or an act of the

[39] *Lenz v. Winburn*, 51 F3d 1540, 1548 (11th Cir. 1995).

Georgia Legislature provides greater protections for our citizens than does the Federal Constitution, Georgia is free to apply such standard where there is no reliance on the Federal Constitution or United States Supreme Court precedent, which circumstances are not applicable here.

This limitation on our power is evident from the standards adopted by the United States Supreme Court in determining whether it might have jurisdiction over a case.

> Under *Michigan v. Long*,[40] when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground [are] not clear from the face of the opinion, [the United States Supreme Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." Id. at 1040-1041.

(Footnote omitted.) *Ohio v. Robinette*.[41]

There is no question that this case relies directly and inextricably on federal law. Even those Georgia cases cited by the majority and special concurrence in reaching their conclusions explicitly cite precedent from the United States Supreme Court as the basis for their holdings. Furthermore, neither the majority nor the special concurrence has cited any source of state legal authority under

[40] *Michigan v. Long*, 463 U.S. 1032 (103 SC 3469, 77 LE2d 1201) (1983).

[41] *Ohio v. Robinette*, 519 U.S. 33, 37 (117 SC 417, 136 LE2d 347) (1996).

our constitution, case law, or statute, which would allow them to set forth the rule they now wish to enforce.

In the absence of such authority, this Court simply has no power to ignore the facts and holding of *Matlock*. We cannot unilaterally impose greater restrictions on police activity than those held by the United States Supreme Court to be necessary under federal standards unless we can unequivocally base our opinion either on a decision by our state Supreme Court so interpreting our State Constitution or a statute enacted by our legislature, which is not unconstitutional. See, e.g., OCGA § 17-5-30 (no good faith exception to the exclusionary rule in Georgia). The majority and special concurrence cite no such authority. In addition to failing to follow binding federal precedent, the holdings of the majority and special concurrence in establishing their new standard usurp the authority of both our state Supreme Court and our legislature. Such a holding oversteps this Court's bounds.

Turning to the substance of the case now before us, the hallmark of Fourth Amendment jurisprudence is protection from *unreasonable* and *arbitrary* searches and seizures by the State. If a police officer has been informed by one occupant of a particular premises that his or her co-occupant has committed a crime inside and explicitly gives the officer permission to search the premises, it cannot be said that the officer acts *unreasonably* or *arbitrarily* in conducting a search based on this consent, even if the co-occupant is present and objects to the search.

In turn, the application of the Fourth Amendment to cases involving the consent of a third-party co-occupant to search shared property is based on the idea that, by sharing property, one may waive his expectation of privacy

with regard to the shared property and assume the risk that any person sharing dominion over it may, *in his own right*, allow a search of that property, unless and until such time as the property is no longer shared and the waiver of privacy rights has thereby been explicitly withdrawn. See, e.g., *United States v. Morning*;[42] *United States v. Flores*.[43]

In this case, the police officers acted reasonably in searching the premises in question after the defendant's wife informed them of a crime being committed and then consented to the search. Because the defendant shared dominion over the property with his wife at the time consent was given by her, the waiver of his expectation of privacy with regard to the premises remained in effect. With his expectation of privacy still waived with regard to his wife, the defendant had no right to trump her consent to search their home. Id.

A detailed consideration of the facts of *Matlock* directly informs our decision here.

> Matlock was indicted in February 1971 for the robbery of a federally insured bank in Wisconsin, in violation of 18 U.S.C. § 2113. A week later, he filed a motion to suppress evidence seized by law enforcement officers from a home in the town of Pardeeville, Wisconsin, in which he had been living. Suppression hearings followed. As found by the District Court, the facts were that respondent was arrested *in the yard in front of the Pardeeville home* on November 12, 1970. The home was leased from the owner by Mr. and Mrs. Marshall. Living

[42] *United States v. Morning*, 64 F3d 531, 536(B) (9th Cir. 1995).

[43] *United States v. Flores*, 172 F3d 695, 698(A) (9th Cir. 1999).

> in the home were Mrs. Marshall, several of her children, including her daughter Mrs. Gayle Graff, Gayle's three-year-old son, and respondent. *Although the officers were aware at the time of the arrest that respondent lived in the house, they did not ask him which room he occupied or whether he would consent to a search.* Three of the arresting officers went to the door of the house and were admitted by Mrs. Graff, who was dressed in a robe and was holding her son in her arms. The officers told her they were looking for money and a gun and asked if they could search the house. Although denied by Mrs. Graff at the suppression hearings, it was found that she consented voluntarily to the search of the house, including the east bedroom on the second floor which she said was jointly occupied by Matlock and herself. The east bedroom was searched and the evidence at issue here, $4,995 in cash, was found in a diaper bag in the only closet in the room. The issue came to be whether Mrs. Graff's relationship to the east bedroom was sufficient to make her consent to the search valid against respondent Matlock.

(Footnote omitted; emphasis supplied.) *Matlock*, supra at 166-167.

In order to answer this question, the Supreme Court first canvassed the law regarding third-party consents to search as it had developed in a number of federal district courts around the country. The Supreme Court summarized:

> It has been assumed by the parties and the courts below that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the

search to be used against him at a criminal trial. This basic proposition was accepted by the Seventh Circuit in this case, as it had been in prior cases, and has generally been applied in similar circumstances by other courts of appeals, and various state courts. This Court left open, in *Amos v. United States*,[44] the question whether [a] wife's permission to search the residence in which she lived with her husband could "waive his constitutional rights," but more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared. In *Frazier v. Cupp*,[45] the Court "dismissed rather quickly" the contention that the consent of the petitioner's cousin to the search of a duffel bag, which was being used jointly by both men and had been left in the cousin's home, would not justify the seizure of petitioner's clothing found inside; joint use of the bag rendered the cousin's authority to consent to its search clear. Indeed, the Court was unwilling to engage in the "metaphysical subtleties" raised by Frazier's claim that his cousin only had permission to use one compartment within the bag. By allowing the cousin the use of the bag, and by leaving it in his house, Frazier was held to have assumed the risk that his cousin would allow someone else to look inside. Ibid. More generally,

[44] *Amos v. United States*, 255 U.S. 313, 317 (41 SC 266, 65 LE 654) (1921).

[45] *Frazier v. Cupp*, 394 U.S. 731, 740 (89 SC 1420, 22 LE2d 684) (1969).

in *Schneckloth v. Bustamonte*,[46] we noted that our prior recognition of the constitutional validity of "third party consent" searches in cases like *Frazier* and *Coolidge v. New Hampshire*,[47] supported the view that a consent search is fundamentally different in nature from the waiver of a trial right. *These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.* The issue now before us is whether the Government made the requisite showing in this case.

(Citation and footnotes omitted; emphasis supplied.) *Matlock*, supra at 169-172.

Expounding on the emphasized language above, the Supreme Court clarified:

> The authority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection *in his own right* and that *the others have assumed the risk that*

[46] *Schneckloth v. Bustamonte*, 412 U.S. 218 (93 SC 2041, 36 LE2d 854) (1973).

[47] *Coolidge v. New Hampshire*, 403 U.S. 443, 487-490 (91 SC 2022, 29 LE2d 564) (1971).

> *one of their number might permit the common area to be searched.*

(Emphasis supplied.) *Matlock*, supra at 171, n. 7.

Based on these conclusions of law, the Supreme Court, after finding that Matlock's girlfriend did indeed have equal dominion and control over the house and the bedroom, ruled that the search and seizure in that case were acceptable. And, the Supreme Court reached this conclusion despite the fact that, at the time that police asked Matlock's girlfriend for permission to search, Matlock was *present* and standing just in the front yard, and *the officers knew that Matlock was an occupant of the house but chose not to ask him for permission to search.* Clearly, the logical basis for this conclusion was just as the Supreme Court explicitly stated in the case: any co-habitant has the right to permit the inspection of shared property *in his own right* based on his relationship to the premises or effects sought to be inspected, and the presence or absence of any other co-habitant cannot alter or vitiate this right.

A large number of other courts and jurisdictions have reached this conclusion.

> It is well settled that a search conducted pursuant to voluntarily obtained consent comes within an exception to the general warrant requirement of the [F]ourth [A]mendment. *Schneckloth v. Bustamonte*, [supra]. It is equally well settled that a third person, other than the defendant, can consent to a search of a defendant's premises or effects if that third person has common authority over the premises or effects. [*Matlock*, supra]. *Matlock did not depend on the defendant's absence for the defendant there had just been*

> *arrested in the front yard of the residence when the third person's consent to search was procured.*

(Emphasis supplied.) *United States v. Sumlin.*[48] See also *J.L. Foti Constr. Co. v. Donovan.*[49]

In addition, as stated in *People v. Cosme*:[50]

> an individual who possesses the requisite degree of control over specific premises is vested in his own right with the authority to permit an official inspection of such premises and that this authority is not circumscribed by any "reasonable expectation of privacy" belonging to co-occupants. Whether the principle is characterized as an "assumption of risk" or a relinquishment of the "expectation of privacy" guaranteed by the Fourth Amendment, the fact remains that where an individual shares with others common authority over premises or property, he has no right to prevent a search in the face of the knowing and voluntary consent of a co-occupant with equal authority. It then follows that such an individual has no constitutional ground for complaint, in the absence of some other taint arising in connection with the search, when evidence obtained in the search is sought to be used against him in a subsequent criminal proceeding.

Id. at 292.

A co-occupant's presence or absence at the time of another co-occupant's consent to search raises a distinction

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[48] *United States v. Sumlin*, 567 F2d 684, 687 (6th Cir. 1977), cert. denied, 435 U.S. 932 (98 SC 1507, 55 LE2d 529) (1978).

[49] *J.L. Foti Constr. Co. v. Donovan*, 786 F2d 714 (6th Cir. 1986).

[50] *People v. Cosme*, 48 N.Y.2d 286 (397 NE2d 1319) (1979).

without a constitutional difference where the expectation of privacy has been relinquished.

> The holding of *Matlock*[, supra,] focused on whether or not the "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." [Id. at 171.] The rationale behind this rule is that a joint occupant assumes the risk of his co-occupant exposing their common private areas to such a search. Id. at 171, n. 7. See *United States v. Solimine*;[51] *United States v. Canada*;[52] *Kirvelaitis v. Gray*.[53] *There is no reasonable expectation of privacy to be protected under such circumstances. We cannot see how the additional fact of Appellant's . . . refusal to consent in any way lessened the risk assumed that his co-occupant would consent. This additional fact does not increase a reasonable expectation of privacy.*

(Emphasis supplied.) *Sumlin*, supra at 688.

> Anyone who "possesse(s) common authority over or other sufficient relationship to the premises or effects sought to be inspected" may consent to the search of another's property. [*Matlock*, supra at 171]. . . . *Matlock's* third-party consent rule applies even when a present subject of the

[51] *United States v. Solimine*, 536 F2d 703, 707-708 (6th Cir. 1976), vacated on other grounds, 429 U.S. 990 (97 SC 517, 50 LE2d 603) (1976), reaff'd as modified, 551 F2d 124 (6th Cir. 1977).

[52] *United States v. Canada*, 527 F2d 1374, 1379 (9th Cir. 1975), cert. denied, 429 U.S. 867 (97 SC 177, 50 LE2d 147) (1976).

[53] *Kirvelaitis v. Gray*, 513 F2d 213, 215 (6th Cir.), cert. denied, 423 U.S. 855 (96 SC 103, 46 LE2d 80) (1975).

> search objects. See, e.g., *United States v. Donlin*;[54] *United States v. Childs*;[55] *J.L. Foti Constr. Co.*, [supra at 717]; *Donovan v. A.A. Beiro Constr. Co.*;[56] *United States v. Baldwin*;[57] *United States v. Bethea*.[58]

Lenz, supra.

As stated in *United States v. Shelton*,[59] "the Fourth Amendment does not protect 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'"

The analyses of the majority opinion and special concurrence in this case are flawed for two main reasons: (1) they misconstrue the analysis in *Matlock* and (2) they conflate two separate elements in the Fourth Amendment jurisprudence at play here – the waiver of an expectation of privacy to a co-occupant and the effect of that waiver on the waiving individual's right to refuse a search of a shared premises consented to by a co-occupant. Each of these points will be considered in turn.

The special concurrence mischaracterizes the holding in *Matlock*, as standing for the proposition that one co-occupant can only consent to a search against another co-occupant who is absent from the scene. Contrary to the

[54] *United States v. Donlin*, 982 F2d 31, 33 (1st Cir. 1992).

[55] *United States v. Childs*, 944 F2d 491, 495 (9th Cir. 1991).

[56] *Donovan v. A.A. Beiro Constr. Co.*, 746 F2d 894, 899, n. 4 (D.C. Cir. 1984).

[57] *United States v. Baldwin*, 644 F2d 381, 383 (5th Cir. 1981).

[58] *United States v. Bethea*, 598 F2d 331, 335 (4th Cir.), cert. denied, 444 U.S. 860 (100 SC 124, 62 LE2d 81) (1979).

[59] *United States v. Shelton*, 337 F3d 529, 537 (5th Cir. 2003).

special concurrence, *Matlock* was *not* a case where the complaining co-occupant was absent. Matlock was *on the premises*, and despite their knowledge of his dominion over the searched property, the police chose not to seek Matlock's permission to search. In spite of Matlock's presence, the Supreme Court still found that the search was proper.

The special concurrence establishes an exigent circumstance requirement for valid consent from a co-occupant in Georgia. This would result in a different application of the Fourth Amendment in Georgia than in the federal courts or in the courts of other states. Under the Fourth Amendment, there are two general exceptions to a warrantless search: (1) valid consent and (2) exigent circumstances. If one exception exists, it is generally irrelevant to the validity of the search whether the other one also exists.

The requirement that a spousal consent to search is valid only if an exigent circumstance also exists merges two independent authorizations for a search. If an exigent circumstance exists, there is no need for consent from either spouse. On analysis, the special concurrence's position effectively establishes that one spouse cannot validly consent to the search of the marital home, if the other spouse is present and refuses the request to search. In other words, either spouse could effectively veto the valid consent to search of the other, absent the existence of an exigent circumstance. The Fourth Amendment requires a valid consent or the existence of an exigent circumstance to support a warrantless search of a marital abode. While not applicable here, the authority to consent to a warrantless search of a marital abode is not even limited to the parties to the marriage.

Despite persuasive federal cases from the First, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits which are *directly on point* in this matter and state the *opposite* conclusion,[60] the majority opinion states: "*Matlock* and its progeny stand for the proposition that, in the absence of evidence to the contrary, there is a presumption that a co-occupant has waived his right of privacy as to other co-occupants. However, when police are confronted with an unequivocal assertion of that co-occupant's Fourth Amendment right, such presumption cannot stand."

The majority espouses a bright-line rule that, when a present co-occupant unequivocally objects to a search, police should be required to obtain a warrant even if another co-occupant has agreed to the search. In reaching this conclusion, the majority conflates two factors which must be considered separately in analyzing these cases: (1) an individual's waiver of his expectation of privacy and (2) the effect of such waiver on the waiving individual's subsequent right to refuse a search consented to by a co-occupant of a shared premises.

The analysis of *Matlock* and its progeny is based on the acquiescence of the defendant co-occupant to the mutual use of certain property with a second co-occupant. By agreeing to the mutual use of his property, the defendant co-occupant waives his Fourth Amendment expectation of privacy concerning the shared property with regard to the second co-occupant and directly assumes the risk

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[60] See, e.g., *Donlin*, supra; *Bethea*, supra; *Baldwin*, supra; *Sumlin*, supra; *Childs*, supra; *United States v. Rith*, 164 F3d 1323 (10th Cir. 1999); *Lenz*, supra; *Donovan*, supra. It does not appear that this question has been directly faced in any of the remaining circuits.

that the second co-occupant, exercising his dominion over the property, might allow others to search it. Following such waiver, the second co-occupant, *in his own right and irrespective of the rights of his other co-occupants*, has the authority to permit an inspection of the shared area.

Contrary to the majority, one cannot summarily eliminate the authority of the co-occupant to consent to the search without first eliminating the waiver. Once the first co-occupant waives his expectation of privacy with regard to the second co-occupant by sharing dominion over certain property, he cannot regain that expectation of privacy and trump the resulting authority of the second co-occupant to allow a search *in his own right* simply by being present at the time the second co-occupant is asked to consent to a search. This is true because the resulting authority of the second co-occupant cannot be removed unless and until the causative sharing of dominion over property has ceased. "A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence." *Morning*, supra at 536. Accordingly, cases such as *Montero v. State*,[61] in which a single individual who has not shared dominion over his property and later withdraws his consent to search, have absolutely no relevance to the matter now before us.

The majority provides that, absent exigent circumstances, a warrant must be sought when a co-occupant is present and objecting, but not when one co-occupant is simply absent when the consent to search is given by another co-occupant. Under this theory, Randolph's right

[61] *Montero v. State*, 245 Ga. App. 181 (537 SE2d 429) (2000).

to thwart a co-occupant's authorized search is based on his presence at the time of the search rather than his expectation of privacy. If a defendant's right to be free from an unreasonable search is based on an underlying expectation of privacy, then his presence or absence is irrelevant. The argument of the majority, in fact, involves asserting a right that has previously been waived. This Court lacks the authority to restrict United States Supreme Court precedent in this way.

And, even if one were to accept this bright-line rule requiring a warrant, one must then question what purpose it would serve. For example, under the very facts of this case, would the reviewing magistrate have any authority to disregard *Matlock's* clear holding that any co-occupant "has the right to permit the inspection *in his own right*," *Matlock*, supra at 171, n. 7, and deny the warrant? The answer, of course, is "no." As such, the bright-line rule of the majority serves only to delay the inevitable by complicating the search and seizure law and procedure and has no real effect on the fundamental rights of the parties involved.

Furthermore, the majority's analysis, which relies upon the concept of one spouse improperly waiving the rights of the other, does not comport with the current state of the law. This problem is illustrated by *People v. Jackson*,[62] in which a New York court, citing *Cosme*, supra, held that a wife could consent to a search of personal effects of her husband not exposed to public view. In doing so, the

[62] *People v. Jackson*, 170 Misc.2d 478 (649 NYS2d 334) (Crim. Ct. 1996).

court rejected earlier New York cases which adopted the analysis espoused by the majority. The court found:

> As Professor LaFave notes, it is doubtful whether the approach followed in [earlier cases] is consistent with more recent Fourth Amendment jurisprudence, since [that approach] relies upon a theory of one spouse waiving the other's constitutional rights, as opposed to the "common authority" rationale adopted by the Supreme Court in *Matlock*[,] supra. LaFave observes: "(T)he mere fact that a certain object may be characterized as a 'personal effect' does not compel the conclusion that no risk is assumed by leaving that object in premises also occupied by a spouse[.] . . . "(T)he question is not whether the object seized was a personal effect of the nonconsenting spouse, but rather whether the object was kept in a place devoted to his exclusive use." 3 LaFave, Search and Seizure § 8.4[a], at 761 (3d ed).

(Punctuation omitted.) Id. at 481.

Based on this observation, the *Jackson* court held:

> [T]his court presumes that Ms. Scipio had authority to consent to a search of defendant's dresser drawer. Although Ms. Scipio indicated that the drawer in which the guns were found was used by defendant, the unlocked drawer was in a dresser located in defendant and Ms. Scipio's bedroom. Ms. Scipio used one of the drawers in the same dresser. Defendant did not adduce any evidence that he had exclusive control over the top drawer or that his use of two of the three dresser drawers was anything other than a practical arrangement commonly agreed to by married persons. (*See*, 3 LaFave, Search and Seizure § 8.4[a], at 762 (3d ed) ("Under the *Matlock* assumption of risk approach, the requisite exclusive use is not established by the mere fact that only the other spouse had heretofore made it a practice to use the particular area searched; something more specific by way of a showing that the consenting spouse was denied access is required").) Without such evidence, defendant has failed to rebut the presumption of mutual authority and the court finds that Ms. Scipio lawfully could consent to a search of defendant's dresser drawer.

(Footnote omitted.) Id. at 483-484.

In support of its conclusion, the majority cites three cases, each of which is outdated, totally distinguishable, or otherwise problematic. First, the majority cites *State v. Leach*.[63] As an initial matter, *Leach* misstates the holding of *Matlock*, purporting that the Supreme Court ruled: "the consent of one who possesses common authority over premises or effects is valid against the absent, nonconsenting person with whom that authority is shared." (Punctuation and emphasis omitted.) Id. at 739. As noted above, this was, without question, not the holding of *Matlock*, as the defendant there was present at the time of the search. Thus, *Leach* is fundamentally flawed. Moreover, in reaching its conclusion, *Leach* relies almost exclusively on precedent pre-dating the decision in *Matlock*. And, finally, *Leach* is completely distinguishable from the current matter because, unlike the case now before us, the defendant in *Leach* did not object to the search in question. Id. at 738.

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[63] *State v. Leach*, 113 Wash.2d 735 (782 P2d 1035) (1989).

The majority also cites Florida law to support its position. The law in that state which is applicable here can be traced to *Silva v. State*.[64] In *Silva*, the Florida Supreme Court considered the validity of a search of a closet in a home after the wife consented to the search and her husband, who was present, objected to the search. Although it ultimately held that the wife had no common authority over the closet in question and, therefore, could not assent to its search, the Florida court opined:

> It is only reasonable that the person whose property is the object of a search should have controlling authority to refuse consent. His rights are personal to him and derive from the United States Constitution. Though a joint occupant should have authority to consent to a search of jointly held premises if the other party is unavailable, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another. This is particularly true where the police are aware that the person objecting is the one whose constitutional rights are at stake.

(Citation omitted.) Id. at 562-563.

The viability of the Florida court's conclusion, however, is drawn into serious question for two reasons. First, the Florida court misstates the facts of *Matlock*, supra, and purports that the defendant in that case was absent when consent was requested from his co-habitant to search. That, of course, was simply not the case. Second, in reaching its conclusion, the Florida court relies exclusively on cases pre-dating the decision in *Matlock*, all of which

[64] *Silva v. State*, 344 S2d 559 (Fla. 1977).

are, themselves, of questionable authority in light of the *Matlock* opinion. In essence, the entirety of *Silva's* analysis directly relies on outdated precedent.

The majority also cites *In the Matter of the Welfare of D.A.G.*[65] to support its proposition. In that case, however, the court specifically noted: "We do not . . . decide what the result would be where both consenting and non-consenting joint occupants are present when the police request permission to search a premises." Id. at 790. Therefore, *D.A.G.* has no application here.

Finally, contrary to the majority, our charge is to follow the United States Supreme Court on federal constitutional issues, not expand such holdings. We must apply the law as it actually stands, not the law as we aspire it to be. Where either the Georgia constitutional or statutory law provides greater protection for Georgia citizens than does the Federal Constitution, the greater protection will be enforced. There is no such greater protection provided under Georgia law in this case.

Turning to the case now before us, the material facts are not in dispute. On July 6, 2001, Scott Randolph and his wife, Janet, were living together in their marital home. That morning, Janet called police to report a domestic disturbance, and, when officers responded to her home, she told them that Scott had absconded with their child. She also complained that her husband had been causing marital and financial problems by abusing cocaine. A few minutes later, Scott returned home and told the officers that he was afraid that Janet was going to take their child

[65] *In the Matter of the Welfare of D.A.G.*, 484 NW2d 787 (Minn. 1992).

away with her to her family in Canada. Scott stated that, for that reason, he had taken his child to a neighbor's home.

The officers then retrieved the Randolphs' child and returned to the marital home. Janet repeated her complaints about her husband's cocaine use, and one of the police officers confronted Scott about her accusations. The police officer asked Scott if he could search the premises, and Scott refused to consent. The police officer then asked Janet if he could search, and she consented. Janet then personally led the police officer into the marital bedroom where he discovered a piece of a drinking straw coated with cocaine residue. The police officer then left the residence to retrieve an evidence bag from his vehicle. When he returned, Janet, after a discussion with her husband, decided to withdraw her consent to search. The police officer collected the contraband he had seen earlier and escorted Scott and Janet to the police station. The police officer subsequently obtained a warrant to further search the home. During the later search, approximately 25 additional drug-related items were seized.

Later, Scott Randolph filed a motion to suppress the evidence discovered in his home, contending that, because he had refused to consent to a search, his Fourth Amendment right to privacy had been violated when police officers searched his home based on the consent of his wife. Scott further argued that all drug-related items found in the second search of his home were "fruits of the poisonous tree." The trial court denied the motion to suppress, and Scott Randolph now appeals this ruling.

The only question in this case, just as in *Matlock*, supra, is whether Scott's wife was "a third party who

possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." Id. at 171. Here, that question must be answered affirmatively. Janet shared full dominion over the marital household with her husband and the bedroom in which the contraband was discovered. Accordingly, Scott clearly assumed the risk that his wife would consent to the search of the home, and, as such, his Fourth Amendment rights to privacy were not violated when his wife gave such consent.

Thus, for the reasons set forth above, I believe that the trial court properly denied Scott Randolph's motion to suppress, and I therefore dissent.

I am authorized to state that Presiding Judge Andrews joins in this dissent.

DECIDED DECEMBER 1, 2003 – CERT. APPLIED FOR.

Motion to suppress. Sumter Superior Court. Before Judge Peagler.

Collier & Gamble, Wilbur T. Gamble III, for appellant.

Cecilia M. Cooper, District Attorney, Richard E. Thomas, for appellee.

No. 04-1067

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In The

Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

vs.

SCOTT FITZ RANDOLPH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

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STATEMENT OF THE CASE

Respondent, Scott Fitz Randolph agrees with the general statement of the case included in Petitioner's Writ of Certiorari, with a few exceptions. Respondent adds to the statement of the case that not only did Scott Fitz Randolph initially refuse a request to search his home but Scott Fitz Randolph repeatedly told the investigating Officer he did not have permission to search his home. This denial of the right to search was unequivocal and unambiguous.

REASONS FOR DENYING THE WRIT

Respondent respectfully shows this Court that Petitioner's request for Petition for Writ of Certiorari should be denied. There is no compelling reason for this Court to intervene concerning the ruling of the Supreme Court of the State of Georgia.

Petitioner asserts this Court should decide the matter because, "there is currently a conflict among Federal and State Court on whether Police may obtain valid consent to search from one occupant with common authority over shared premises in the face of another occupants presence and objection to the search." (Petitioners Brief, Page 7) The fact a conflict exist between various States does not mean a uniform ruling is necessary or even desired.

The Georgia Court of Appeals in it's initial ruling in favor of Randolph correctly cited the case of *Powell v. State*, 270 Ga. 327, 510 S.E. 2d 18 (1998) which reiterated the long held proposition under Georgia Law that "the right to be let alone" guaranteed by the Georgia Constitution is

far more extensive than any right of privacy protected under the United States Constitution. *Id.* at 330, see *Randolph v. State*, 264 Ga. App. 396, FN11 (2003).

Each State has the inherit right to extend the protection of one's right to privacy if a State so chooses. The fact that several other jurisdictions have ruled in a contrary way to the State of Georgia does not establish the need for a conforming Federal Ruling. Allowing this ruling to stand will not place any undue burden on law enforcement because all law enforcement Officers in the State of Georgia can easily be made aware of the bright line test established by the Supreme Court of Georgia. The same holds true for any Federal Agents who may operate within the State of Georgia.

The State of Georgia wrongfully argued the current ruling by the Supreme Court of Georgia unfairly leaves citizens with a rule which turns upon the timing of a request to search. This argument placed before the Court is quite illogical. The State argues that if the officer had waited until Mr. Randolph left the home the Officer would then have been able to search the home by simply asking permission from Mrs. Randolph. The State claims this results in timing (based on who is or who is not present) being the issue in deciding whether or not to search. No matter the rule of law established, this fact will remain the key. If Mrs. Randolph had left the home and the police officers requested the right to search from Mr. Randolph, it is undeniable the officers would not have had the right to search the home. This denial would be based on the timing of requesting the right to search from the husband after the wife had left the home. Under any rule devised it will always be a matter of timing in determining these type matters.

The real issue concerns the construction of the rule of law that establishes the right of one co-occupant to allow the complete search of a home. Almost all Courts have agreed that if one co-occupant is present they have the right to allow the search of a home even if the other co-occupant is not asked or is not present. See *United States v. Matlock*, 415 U.S. 164 (1974). This rule of law was established based on the creation of a legal fiction that a co-occupant has either assumed the risk that the co-occupant will allow a search or by virtue of living with the co-occupant has implied the right of the co-occupant to grant the right to search. These legal fictions were created to protect police officers so they did not need to establish every occupant residing at a particular residence prior to searching the home. The rule of law is sound when applied under these conditions.

In a situation in which both co-occupants are present, however, there is no need to apply a legal fiction. By way of analogy, in most Civil cases persons still maintain the right to take the 5th Amendment and refuse to testify on grounds that the testimony might incriminate the individual. This right of refusal exists but a jury is instructed they may infer from the taking of the 5th Amendment that testimony would be harmful to the individual if presented. If, however, the individual changes their mind about the 5th Amendment and decides to testify the inference disappears. The same holds true concerning co-occupants. If they are both present, the inference and any assumption of risk disappears. The co-occupant is then present to state affirmatively whether or not he wishes to allow a search. Once refusal is stated, this refusal should not be trumped by the permission of a co-occupant.

The State argues just the opposite: affirmative permission to search the home should not be trumped by the co-occupant's refusal. The Court should balance the interest of both parties in making a decision as to which parties statement should be controlling. Which right is more important; the right to be free from an illegal or unwarranted search and seizure of ones property or the property right of one to allow a search? Clearly, the 4th Amendment right to protection against unreasonable search and seizure clearly outweighs any right a co-occupant may have in allowing a search. Arguments stating this will deter a co-occupant from reporting a crime are without merit because under these circumstances the Police may be able to search if there is danger of harm to someone under the exigent circumstances exception and otherwise, the police have a valid reason to obtain a warrant based on a co-occupant's report of some type criminal behavior, illegal evidence or the like.

This Court should not grant Certiorari in this matter because each State has the right to establish it's own rule of law concerning search and seizure so long as it does not infringe upon the constitutional rights granted by the United States Constitution. The Supreme Court of Georgia's ruling does not interfere with or unconstitutionally affect the rights of it's citizens under the United States 4th Amendment protections. Secondly, the ruling of the Georgia Supreme Court does not place an unfair rule of law upon the citizens of the State of Georgia and in fact, simply grants a more extensive right to privacy under Georgia's Constitution.

CONCLUSION

Wherefore for all of the foregoing reasons, Respondent, Scott Fitz Randolph, prays that this Court deny the State of Georgia's Petition for Writ of Certiorari because the question presented by the State is not one which requires Federal law conformity and the rule of law established by the Supreme Court of Georgia is well reasoned and constitutional.

Respectfully submitted, this 10th day of March, 2005.

COLLIER & GAMBLE, LLP
W. T. GAMBLE, III

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JUN 15 2005

No. 04-1067

In The Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

JOINT APPENDIX

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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Opinion of the Court of Appeals of Georgia, *Georgia v. Randolph*, 264 Ga. App. 396, 590 S.E.2d 834 (2003) ..... App. 7

Opinion of the Supreme Court of Georgia, *Georgia v. Randolph*, 278 Ga. 614, 604 S.E.2d 835 (2004) ..... App. 1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 27, 2001 – Indictment against Scott Randolph filed in the Superior Court of Sumter County, Georgia

Jan. 17, 2002 – Randolph filed a motion to suppress

Jan. 25, 2002 – Randolph filed a brief in support of the motion to suppress

Oct. 3, 2002 – State filed a brief opposing Randolph's motion to suppress

Oct. 3, 2002 – Evidentiary hearing held on the motion to suppress

Oct. 17, 2002 – Order entered by the Superior Court, denying Randolph's motion to suppress

Nov. 26, 2002 – Order entered by the Court of Appeals of Georgia, granting Randolph's application for interlocutory appeal

Dec. 4, 2002 – Randolph's notice of appeal filed

Dec. 1, 2003 – Opinion of the Court of Appeals of Georgia

Nov. 8, 2004 – Opinion of the Georgia Supreme Court

IN THE SUPERIOR COURT OF SUMTER COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	**INDICTMENT NO. 2001-SU-R-699**
VS.	**POSSESSION OF COCAINE**
SCOTT FITZ RANDOLPH,	
Defendant.	

MOTION TO SUPPRESS

(Filed January 17, 2002)

NOW COMES SCOTT FITZ RANDOLPH, Defendant in the above-styled action, by and through his Attorney of Record, with prior leave of the Court, aggrieved by unlawful searches and seizures made by the state and local officers under purported authority did seize certain described property, namely alleged cocaine and cocaine residue, moves this Court to quash said warrants and indictments, and to suppress as evidence any object, article, thing or other evidence gained or thereafter gained by state, local, and/or federal agents.

1.

Defendant shows that he is charged in the above-styled indictment with the offense of possession of cocaine and that he denies said allegations in their entirety.

2.

The Defendant further alleges that the alleged cocaine seized at his residence and office will be offered as evidence against him at any trial of the above-styled charges in said indictment and that further and finally all of the

charges set forth in said indictment are the result of this illegal search and seizure aforesaid.

3.

Defendant shows that on the date of the arrest Defendant was present at his home with his wife, Janet Randolph. Officers had appeared at the residence in response to a domestic disturbance call.

4.

The officers present requested the right to search the residence of Scott F. Randolph and Janet Randolph. Janet Randolph granted permission to search the home, but Scott F. Randolph steadfastly refused to grant said permission.

5.

In addition, this residence also served as an office for the law practice of Scott F. Randolph and Scott F. Randolph explicitly denied permission for the officers to search this office, which was solely in his control and dominion and reiterated his refusal to allow the search of the home without a warrant.

6.

Despite the refusal of Scott F. Randolph to allow the search of the home and his office, the officers proceeded forward with the search, without a warrant, and without permission. Furthermore, once the search ensued, the Defendant's wife, Janet Randolph, withdrew her

permission and consent to search the home and the officers continued and ignored her request to withdraw permission.

7.

The action performed by law enforcement in searching the home and office of Scott F. Randolph were in violation of Scott F. Randolph's Fourth Amendment due process rights, guaranteed under the United States Constitution, and the Georgia State Constitution and constitute an illegal search and seizure, which is prohibited by both the United States Constitution and the Georgia State Constitution.

WHEREFORE, the Defendant prays and demands that his Motion bye inquired into by this Honorable Court; and

(a) That a day certain be set requiring the District Attorney of the Sumter County Superior Court to be and appear at a certain time and day to show cause why the prayers and demands of this Defendant should not be granted; and

(b) That this Honorable Court issue its Order suppressing any unreasonably obtained evidence and testimony relevant thereto, together with any after-gained evidence or testimony, and rule further the same inadmissible upon the trial of the charges set out in the above-numbered indictment.

Respectfully submitted this 17th day of January, 2002.

COLLIER & GAMBLE

/s/ W.T. Gamble III
W.T. Gamble, III
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that I have this day served Richard E. Thomas, Special Assistant District Attorney at 1216 Dawson Road, Suite 202, Albany, Georgia 31707, with a copy of the foregoing matter by depositing in the United States Mail, a copy of same in a properly addressed envelope with adequate postage thereon.

This 17th day of January, 2002.

/s/ W.T. Gamble III
W.T. Gamble, III

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IN THE SUPERIOR COURT OF SUMTER COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	:	
Plaintiff,	:	
Vs.	:	CRIMINAL INDICTMENT NO. 01-R-699
SCOTT FITZ RANDOLPH,	:	
Defendant.	:	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE

(Filed January 25, 2002)

Comes now the Defendant, Scott Fitz Randolph, by and through his attorney of record, W.T. Gamble, III and files this his brief in support of his motion to suppress which was filed with the Clerk of the Superior Court of Sumter County on the 17th day of January 2002 as follows:

FACTS OF THE CASE

On or about the 6th day of July 2001 law enforcement officers responded to a domestic disturbance call at the home of Scott Fitz Randolph and his wife (at the time) Janet Randolph. Upon arriving at the scene, the officers discovered that the couple had been arguing as a result of a marital dispute. The police officers at the scene asked if they could be given permission to search the marital home of the parties and Janet Randolph initially gave her consent for the home to be searched. Scott Fitz Randolph was present during this entire conversation and vigorously objected to granting permission for the search of the marital home. In addition, Scott Fitz Randolph's law office

was maintained in a portion of this home and he objected to any search of this property as well. The police officers did not have a valid search warrant at the time they responded to the domestic disturbance call and no search warrant was obtained prior to the police officers beginning their search of the marital home. Despite the objections by Scott Fitz Randolph, the police officers proceeded to search the home including Scott Fitz Randolph's office. At the conclusion of the search, the law enforcement officers alleged that cocaine was found in the home, discovered in the office of Scott Fitz Randolph, and subsequently Scott Fitz Randolph was arrested for possession of cocaine. Prior to the discovery of any alleged illegal substance, however, Janet Randolph also withdrew her permission for the search to continue and despite this withdrawal, the police continued to search discovering the alleged illegal contraband. Defendant Scott Fitz Randolph contends this search was illegal and in violation of the 4th Amendment of the United States Constitution and the 4th Amendment of the Georgia State Constitution. Furthermore, Defendant contends that the search was unreasonable under the 4th Amendment and not within any of the few specifically established and well delineated exceptions as discussed and ruled in the case of *Katz vs. United States*, 389 US 347, 357, 88 SE 507, (1967).

ARGUMENT AND CITATION OF AUTHORITY

In *Katz*, the United States Supreme Court ruled, and discussed in great detail, a search without prior approval by a judge, or magistrate, or the issuance of a warrant would generally be per se unreasonable unless it met a few well delineated exceptions. *See* Katz, 357. The Georgia Supreme Court noted one of these exceptions is when a

third party grants the right to search without a warrant if that third party possesses common authority over the premises or had a sufficient relationship to justify the consent. *Atkins vs. State*, 254 Ga 641, 31 SE2d 597, (1985). The court cited several other United States Supreme Court decisions and justified this ruling because it is reasonable to assume persons with joint access have this type control. Therefore, it is uncontraverted [sic] that if Ms. Randolph had been present at her home, alone, she had authority to grant consent. The issue before the court today, however, is one which is of apparent first impression in the State of Georgia. The question which must be resolved before the court is "whether a law enforcement agency or officer may conduct a warrantless search of a home or office of persons (both present) with joint access and authority to grant permission if one of the owners objects to the search and the other grants permission."

There do not appear to be any cases in Georgia which have addressed this specific set of circumstances in the context of a search of a marital residence. Foreign jurisdictions and legal treatisies, however, strongly support the proposition a joint occupant of property, is subject to the property being searched if that person is unavailable and permission given by the other occupant, but if the joint occupant is present and objecting he should not have his constitutional rights ignored simply because a shared property interest exists. *See* 68 Amjur 2d searches and seizure § 92. It is important to note at the time police arrived the couple was involved in a heated domestic dispute. This dispute ultimately led to a divorce proceeding which has now been finalized in the Superior Court of Sumter County. (See Randolph vs. Randolph, Civil Action File No. 99-CV-968)

Courts have evaluated situations in which an angry spouse granted permission to police officers to search the home in hopes of causing trouble for the offending spouse. In some cases a spouse's antagonism toward the other spouse withdraws the authority of this spouse to grant permission for a search. See *State vs. Gonzalez-Valle*, 385 So. 2d 681 (Fla. Dist. Ct. Ap. Third District 1980) and *May vs. State* 780 SW2d 866 (Tex. App. Dallas 1989). Both of these courts took the position that the antagonistic wife granted permission out of anger, spite, hostility, and antagonism and the courts did not wish to foster this type ill-will between married parties. In effect, the court's ruled generally one spouse has agency to grant permission to search property owned by the other spouse so long as each has common access but this agency is destroyed if the motivation is based on ill-will and antagonistic feelings. There are several other foreign jurisdiction cases which seem to follow this same rule but there are also several cases which have ruled the antagonistic spouse does not destroy the agency. It appears, the case of *US vs. McAlpine*, 919 F2d 1461 greatly criticized both *May* and *Gonzales* in dicta stating that the case of the *US vs. Matlock*, 415 US 154, 94 S. Ct. 988, (1974) effectively rejects this agency analysis in favor of an analysis which focuses solely on the consenting parties relationship to the property rather than their relationship to the offended party.

In the case before the court, it is important to note that both spouses were present during the time permission was granted to search the home. One spouse objected to the search, Mr. Randolph, and one spouse, the angry and vindictive Ms. Randolph, consented to the search. Of equal importance, part of the consent was given to search the office of Scott Randolph which was not property for which

both had a common interest and common access. It is believed Ms. Randolph will testify she had access to the office and that she served as a secretary/paralegal to Mr. Randolph but, these positions do not grant her authority to consent to the search of this office. She would have no more right to consent to a search of these areas than would a lawyer's paralegal or secretary have a right to consent to a police officer searching their boss' office. Clearly, this type search would not be allowed and the search of Mr. Randolph's office and home should not have occurred either. Once Mr. Randolph invoked his constitutional right to reject the search without a warrant, regardless of his spouse's permission, the police were under a duty to attempt to receive a search warrant. It is not surprising that courts have ruled when one party is not present, and the other party is present, the present party can consent to a search of commonly held property because of the shared property interest. It is an entirely different situation, however, when both parties are present and one does not grant permission.

Of equal importance, courts throughout the United States have consistently ruled that a spouse does not have permission, even concerning co-tenancy or occupancy, to consent to the search of personal effects of the common occupant. See, *State vs. Evans*, 45 Haw. 622, 372 P.2d 365 (1962) (search of cufflink case in husband bedroom bureau drawer illegal), *Matthews vs. State*, 89 Md. App. 488, 598 A.2d 813 (1991) (Court allows evidence gathered but states a personal drawer of the Defendant could not be searched even with permission by wife), *Henry vs. State*, 253 Miss. 263, 154 So.2d 859 "(1963) appeal to Supreme Court, judgment vacated on other grounds (Wife consented to

search of husband's personal automobile, court rules not valid).

In the *State vs. McCarthy*, 26 Ohio State. 2d87, 55 Ohio Op.2d 161, 269 N.E.2d 424 1971 the Ohio Court stated a spouse's consent is limited to the areas of the home under common control of the parties, as distinguished from a search which was directed toward personal effects of the absent spouse. Scott Randolph's office is not an area that should be considered in joint control of the parties and certainly meets the definition of personal effects. A lawyer's files, and other matters within his office, are highly protected and it is unimaginable that this area would not be considered personal and beyond the scope of consent of the wife. It should be noted that each court made its analysis of whether or not permission could be granted in the context of a search directed toward personal effects of an ***absent*** spouse. In our case, Scott Randolph was present and objecting which further strengthens the argument that no search should have occurred.

California and Florida courts have consistently ruled that if both parties are present, and one objects, a search can not [sic] occur without the police obtaining a warrant. See *Duke vs. Superior Court*, 1 Cal. 3d314, 461 P.2d 628 (1969) and *People vs. Reynolds*, 55 Cal. App. 3d357, 127 Cal. Rp. Tr. 561 (1976) and *Lawton vs. State*, 320 So.2d 463 (Fla. Dist. Ct. App. 2d Dis. 1975) In the Florida case, the court ruled that a search predicated upon the consent of a joint occupant is invalid when the other joint occupant is physically present on the premises and affirmatively objects to the search. *Id.* In this case, a wife who was separated from her husband came to visit the husband in their once marital apartment discovering the husband

with another woman. The separated wife went next door and called the police. Upon arrival of the police, the husband stood in the doorway to the apartment, placed his arms across the doorway, and forbid the police to enter. The wife insisted the police had authority to enter, and based on this consent, the police entered the apartment, searched the apartment, and found marijuana. The court stated it is one thing to find a consent to search shared premises binding upon an absent, non-consenting Defendant, but quite another to hold the consent binding upon a Defendant who has been requested by the police to consent to a search of his property and who has refused that permission. This case is square on the head of the facts of the Randolph case. Scott Randolph clearly and unequivocally denied the police the right to search. This case is not similar to those normally cited whereby one spouse is not present and the other grants permission. In *People vs. Reynolds*, the court stated the right to privacy of the non-consenting co-occupant should always prevail to preclude a valid search. The ruling in *Duke vs. Superior Court*, closely tracts the two previously cited cases.

A final foreign jurisdiction case, *State vs. Walker*, 965 P.2d 1079 (Wash. 1998) states in clear and concise language that a wife may consent to the search of a marital residence when she has equal control over the premises **only during his absence**. *Id.* In this case, the wife had consented to a search of the marital home away from the premises and when the police arrived the husband arrived at the home as well. The husband never refused the right to search the home but he also did not affirmatively consent to the search. The high court of Washington stated the wife's consent could be valid as to any evidence obtained which might be used against her but that any

evidence obtained concerning the husband was inadmissible and could be only used against the wife. *Id.*

The courts have also held that a spouse has no authority to consent to the warrantless search of a premises if the police have been informed beforehand that the absent spouse will not or does not consent to this type search. See, *Daniels vs. State*, 534 So. 2d 628 (Al. Crim. App. 1985)

In short, most courts have ruled that if both parties are present and one objects to the search this objection requires the law enforcement agency to receive a court order or a warrant. Some courts, such as the *Walker* court, have gone so far as to state an affirmative consent must be obtained from the spouse if this spouse is present when officers arrive to search. This court should not allow the constitutional rights of Scott Randolph to be cast aside in the wind simply by a disgruntle [sic] spouse granting permission to search property which is lawfully owned by Mr. Randolph and in a relatively exclusive control situation because the office space was Mr. Randolph's and not Ms. Randolph's.

One California court even went so far as to rule that if a wife has been instructed by a husband not to allow a search of the premises that the wife can not [sic] then grant permission to search the premises to law enforcement agencies. *People vs. Fry*, 271 Cal. App. 2d 350, 76 Cal. Rptr. 718 (4th Dist. 1969). In this case, the husband had already been arrested but specifically refused to allow a search of his home by telling his wife during visitation she was not to allow any search. The police officers were aware of these instructions but searched the home without a warrant upon permission by the wife. The court stated the police were aware of these instructions and they could

not rely upon her consent as justification for their conduct. Surely if orally instructing a spouse to refuse consent prohibits a warrantless search, then the spouse being present and stating adamantly refusal directly to the police officers should require court intervention.

As has been stated earlier in this Brief, the State of Georgia has not directly addressed a situation where one spouse refuses permission and another grants permission with both being present. The State of Georgia has adopted the general rule that a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected can grant permission for a search. *Atkins vs. State*, 254 Ga. 641, at 642 331 SE2d 597 (1985). This ruling, however, does not establish the right to grant permission when the other party is present denying permission. In fact, Georgia courts have stated that one of the most important reasons for requiring a search warrant as a condition to a search is a recognition that reasonable restraints must be placed upon a law enforcement official before a search is conducted rather than simply to measure the validity of a search by post-search inquiry into its reasonableness. *Luke vs. State*, 178 Ga. App. 614, 344 SE2d 452 (1986) (dissenting opinion) A requirement that a police officer obtain a warrant to search the home and business of a non-consenting adult is certainly a reasonable restraint and there is no justification for law enforcement to claim there is no need for a search warrant simply because a co-tenant or spouse attempts to override the objection. The constitutional right of each individual is one of the most highly protected rights granted by the United States Constitution. In fact, most authorities would agree the Bill of Rights are our very foundation for freedom in this

country. These Rights must be protected to the fullest extent available under the law and can not [sic] casually, nor carelessly, be waived by other individuals. Scott Randolph uncategorically denied access to search his home and office. Once law enforcement heard this denial, they should have respected his constitutional rights and attempted to receive a warrant. The warrant was not obtained and therefore, all evidence discovered as a result of this search should be declared illegally obtained evidence and suppressed in this matter.

For the foregoing reasons, Defendant requests all evidence seized at the search on or about July 6, 2001 be declared illegal and suppressed.

Respectfully submitted this 23rd day of January 2002.

/s/ W.T. Gamble III
W.T. Gamble, III

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IN THE SUPERIOR COURT OF SUMTER COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v. INDICTMENT NO.01-R-699

SCOTT FITZ RANDOLPH
DEFENDANT

STATE'S BRIEF OPPOSING DEFENDANT'S MOTION TO SUPPRESS

(Filed October 3, 2002)

Comes now the State of Georgia by and through the District Attorney of the Southwestern Judicial Circuit and files this response in opposition to the defendant's motion to suppress.

FACTS

On July 6, 2001 Janet Randolph called the Americus Police Department and requested that an officer come to 224 Brown Street in Americus in reference to a domestic dispute with her husband, Scott Fitz Randolph. 224 Brown Street was the jointly-occupied marital residence of the Randolphs.

When officers arrived, Mrs. Randolph told them that her husband had been using drugs and that drugs were presently in the residence. Scott Randolph was present and refused to consent to a search of the residence. However, Janet Randolph gave consent and led Sgt. B.D. Murray to a room inside the residence. Sgt. Murray observed cocaine on a dresser in plain view in the room. He went outside to retrieve evidence packaging bags

from his vehicle, at which time Mrs. Randolph (at the insistence her husband) withdrew consent to search.

Sgt. Murray left an officer at the residence to prevent destruction of evidence, and obtained a search warrant from the magistrate. He and other officers served the warrant and discovered additional cocaine in various rooms within the residence. No cocaine or other evidence was discovered in the portion of the residence purportedly used by Scott Randolph as a law office. A copy of the affidavit for search warrant, the search warrant, and the search warrant return are attached hereto as Exhibit A.

A Sumter County Grand Jury returned an indictment charging Scott Fitz Randolph with the offense of possession of cocaine and he subsequently filed a motion to suppress the evidence seized during the search of the residence.

ARGUMENT AND CITATION OF AUTHORITY

1. JANET RANDOLPH'S CONSENT TO SEARCH WAS VALID EVEN THOUGH SCOTT RANDOLPH REFUSED TO CONSENT TO A SEARCH OF THE MARITAL RESIDENCE.

". . . [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects

sought to be inspected." *U.S. v. Matlock*, 415 U.S. 164, 171 (94 S.Ct. 988, 993) (1974.)[1]

There is no doubt that Janet Randolph was a co-occupant of the premises and possessed sufficient common authority over the marital home to consent to a search of the premises. The defendant here argues that the Court should adopt a rule that prohibits a spouse from giving consent to search if the other spouse is present and affirmatively objects to the search.[2] However, this argument was rejected by the Georgia Court of Appeals in *Kendrick v. State*, 211 Ga. App. 599 (440 SE2d 53) (1993). In *Kendrick* two detectives located a vehicle that had been used as the "getaway" car in an armed robbery. They knocked on the door of the registered owner (the defendant's wife) and asked about the car. The defendant's wife invited the detectives into the house where they saw the defendant and recognized him from the video tape of the robbery as the perpetrator. The detectives arrested Kendrick at that time. Kendrick later claimed that he had asked the detectives to leave, thereby revoking any consent to enter the residence that had previously been obtained from the wife. The Court held that **"only defendant's wife could**

[1] The reasoning of *Matlock* was reaffirmed and extended in *Illinois v. Rodriguez*, 497 U.S. 177 (110 S.Ct. 2793) (1990). The Court there held that an officer's good faith belief that the third party had authority to consent to a search validated the search even when it was later discovered that the third party did not have such authority. This holding has been followed in Georgia. *Turner v. State*, 246 Ga. App. 49, 51-52 (539 SE2d 553) (2000); *Ford v. State*, 214 Ga. App. 284(3) (447 SE2d 334) (1994).

[2] Defendant makes the bold assertion in his brief that "most courts have ruled that if both parties are present and one objects to the search this objection requires the law enforcement agency to receive a court order or a warrant." (Defendant's brief page 7, 2nd paragraph)

revoke her consent and there is no evidence defendant's wife indicated agreement with the defendant's request or otherwise acted in a manner to revoke her consent." Id., page 601 (emphasis added). See also *Animashaun v. State*, 207 Ga. App. 156, 158 (427 SE2d 532) (1993) (estranged wife who had key to premises still possessed common authority to give consent to enter marital premises even where husband was on premises and refused to give consent.)

Defendant also argues that the Court should adopt an "angry spouse" rule. Such a rule is based on the old agency theory of third party consent which holds that the agency of one spouse to grant permission to search is destroyed by the ill will of one spouse towards the other. Apparently this argument has not been addressed by the Georgia appellate courts. However, this anachronistic argument has been explicitly rejected by courts in other jurisdictions.[3]

In *U.S. v. McAlpine*, 919 F2d 1461 (10th Circuit 1990) the Court cited *Matlock*, infra, and held that it is the consenting party's relationship to the property, not the tenor of her relationship with the defendant, that is determinative of whether she can consent to a search. The Court further held that there was no expectation of privacy where there is shared property and the other co-occupant grants consent to search. As noted in the defendant's brief, this decision criticized two cases cited by the defendant as support for his position.

[3] *State v. McCarthy*, 269 NE2d 424 (Ohio, 1971); *State v. Bartram*, 925 SW2d 227 (Tennessee, 1996); *Commonwealth v. Noonan*, 720 NE2d 828 (Massachusetts, 1999).

In *U.S. v. Sumlin*, 567 F2d 684 (6th Circuit, 1977) the Court cited *Matlock*, infra, and held that the fact that the defendant refused consent to search does not preclude another person who had common authority over the premises from giving valid consent. The Court also held that there is no reasonable expectation of privacy to be protected because a joint occupant assumes the risk of his co-occupant exposing their common private areas to a search.

The courts in the following cases rejected the argument that a spouse or co-occupant cannot give a valid consent to search where the other spouse or occupant refuses to consent: *State v. Crevina*, 266 A2d 319 (New Jersey, 1970); *Commonwealth v. Martin*, 264 NE2d 366 (Massachusetts, 1970); *State v. Rohrbach*, 763 P2d 196 (Oregon, 1988); *City of Laramie v. Hysong*, 808 P2d 199 (Wyoming, 1991); *People v. Sanders*, 904 P2d 1311 (Colorado, 1995); *People v. Cosme*, 397 NE2d 1319 (New York, 1979).

Georgia and many other states have rejected the defendant's argument. Janet Randolph's consent to search was valid even if the defendant objected. The cocaine observed when Sgt. Murray initially entered the residence should not be suppressed. His observation of the cocaine while lawfully in the residence provided probable cause for issuance of a warrant to search the premises for additional cocaine.

2. THE COCAINE SHOULD NOT BE SUPPRESSED BECAUSE THERE WAS A SOURCE INDEPENDENT OF THE ENTRY INTO THE RESIDENCE THAT SUPPORTED THE ISSUANCE OF THE SEARCH WARRANT.

Even if the Court assumes, for the purpose of argument, that Sgt. Murray's initial entry into the residence

was not authorized, this Court's analysis of the admissibility of the evidence does not end. The "independent source" doctrine permits introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from unlawful activities untainted by the initial illegality. *Murray v. United States*, 487 U.S. 533 (108 S.Ct. 2529) (1988); *Segura v. United States*, 468 U.S. 796 (104 S.Ct. 3380) (1984).

"The admissibility of [evidence] under the independent source exception depends on whether authorities established probable cause to seize the [evidence], either before or after the illegal search, independent of any facts revealed by the unlawful search." *Waldrip v. State*, 267 Ga. 739(18) (482 SE2d 299) (1997).

The independent evidence is Janet Randolph's statements against her penal interest that cocaine was being kept in the residence she jointly occupied with her husband. That statement alone provides sufficient reliability to establish probable cause for a search of the residence. *Sosebee v. State*, 227 Ga. App. 21 (488 SE2d 102) (1997).

If the information concerning Sgt. Murray's observation of cocaine inside the residence is excised from the affidavit for search warrant, the remaining information is sufficient to establish probable cause for the issuance of the search warrant. *Dorminey v. State*, 205 Ga. App. 806 (423 SE2d 698) (1992).

Even without the evidence obtained by Sgt. Murray's initial entry the cocaine would have been inevitably discovered. Suppression is not appropriate under these circumstances.

CONCLUSION

The defendant's motion to suppress should be denied for each of the foregoing reasons.

Respectfully submitted,

/s/ Richard E. Thomas
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[Certificate of Service Omitted In Printing]

[Exhibit A Omitted In Printing]

IN THE SUPERIOR COURT OF SUMTER COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,)
)
v.)
) Case No. 01-R-699-P
SCOTT FITZ RANDOLPH,)
)
Defendant.)

ORDER OF THE COURT

(Filed October 17, 2002)

Defendant, having filed a Motion to Suppress with this Court, and a hearing on that Motion having been held on October 3, 2002 at the Sumter County Courthouse in Americus, Georgia, and upon due consideration of all the information presented in this case, the Court finds the following:

That Defendant's wife was still in possession of common authority to grant consent for police to search the marital home;

That under *Kendrick v. State*, 211 Ga. App. 599 (1993), one spouse can consent to a search of the marital premises, and the other spouse cannot withdraw that consent, regardless of the other spouse's presence or absence at the time the consent was given and knowledge of that consent being given; and

That even though Defendant's wife used knowledge gained from communication between husband and wife, and knew the harm that could result from her consent to search, she was fully competent to grant such consent to search.

In accordance with the foregoing findings, it is hereby

ORDERED that Defendant's Motion to Suppress is DENIED.

DONE THIS the 17th day of October, 2002.

/s/ George M. Peagler, Jr.
Judge, Sumter County
Superior Court
Southwestern Judicial
Circuit

Supreme Court, U.S.
FILED
JUN 15 2005
OFFICE OF THE CLERK

No. 04-1067

In The
Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Can one occupant give law enforcement valid consent to search the common areas of the premises shared with another, even though another occupant is present and objects to the search?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (Pet. App. 1-6) is reported at 278 Ga. 614, 604 S.E.2d 835 (2004). The opinion of the Court of Appeals of Georgia (Pet. App. 7-47) is reported at 264 Ga. App. 396, 590 S.E.2d 834 (2003). The trial court's order denying the motion to suppress (J.A. 23) is unreported.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on November 8, 2004. (Pet. App. 6). The petition for a writ of certiorari was filed on February 4, 2005, and was granted on April 18, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Three decades ago, this Court defined what constitutes "valid consent" for warrantless searches under the Fourth Amendment. The Court also decided who can consent, recognizing that valid consent may be obtained from the person whose property is being searched or from third-parties who have common authority over or a sufficient connection to the premises. This case presents the important question of whether police can obtain valid consent to search a shared premises where both occupants are present and one occupant consents while the other occupant objects.

A. The Motion to Suppress

Respondent Scott Fitz Randolph (hereinafter "Randolph") was indicted by the Sumter County, Georgia, grand jury on November 27, 2001, for possession of cocaine. (R. 7)[1]. Randolph moved to suppress the cocaine which had been seized in a search of the residence he shared with his wife, a search to which his wife consented, as Randolph admitted in his motion to suppress, but for which he had denied permission. (J.A. 3). Randolph claimed that the search of the residence, over his objection, was illegal and violated his Fourth Amendment rights. (J.A. 4).

Evidence presented at the October 3, 2002, suppression hearing established that Randolph's wife called the local police department on the morning of July 6, 2001,

[1] Citations to Volume I of the record on appeal are designated "R."; citations to the Corrected Transcript of Motion to Suppress Hearing are designated "M.T."

and asked an officer to come to the Randolph residence about a domestic dispute with her husband. (M.T. 4-7). Although the couple had previously been separated, she had returned to the marital home approximately three days before with Randolph's consent, and she still had clothing and furniture at the house. (M.T. 14-15; 23-24, 36-38, 43-44). Although the couple actually rented the house from Randolph's father, police understood Randolph and his wife to own the home. (M.T. 17; 30, 38). Randolph, who was then a practicing attorney, had an office in a room of the house.[2] (M.T. 6, 11-12; 25, 29).

Mrs. Randolph told the responding officers that Randolph had taken their child away. (M.T. 5-6). She also complained that Randolph had been using a lot of cocaine, which was causing financial and other problems for them. (M.T. 7). A few minutes later, Randolph returned to the home, told officers where he had taken their son and explained that he had taken the child because he was afraid his wife might take the child away to her family in Canada. (M.T. 6; 24).

Officers then escorted Randolph's wife to the neighbor's home where they picked up the child and returned to the Randolph residence. (M.T. 6-7). Mrs. Randolph renewed her accusations about Randolph's cocaine use. (M.T. 7). She told officers there were "items of drug evidence" in the home. (M.T. 13).

Sergeant Murray asked Randolph if he could check the house, and Randolph said no. (M.T. 7-9, 16; 29). The

[2] Randolph had been disbarred by the time of the suppression hearing. (M.T. 39-40). *See In the Matter of Scott Fitz Randolph*, 274 Ga. 482, 554 S.E.2d 485 (2001).

Sergeant then asked Mrs. Randolph if police could search the house, and not only did she say yes, but Mrs. Randolph led the Sergeant upstairs to a bedroom in which the officer saw a cut piece of a drinking straw on top of a jar. (M.T. 8-9, 16, 18). The straw was coated with white residue, and Sergeant Murray suspected it was used to ingest cocaine. (M.T. 8). He then went downstairs, reported what he had seen and went to his car to get an evidence bag. (M.T. 9).

When the Sergeant returned from the car, Mrs. Randolph had withdrawn her consent. (M.T. 9, 18, 19). The Sergeant then collected the items he had seen upstairs: the straw, a business card and some white residue, and took the evidence, as well as Randolph and Mrs. Randolph, to the police station. (M.T. 9, 20).

The Sergeant then obtained a search warrant to search the home further and seized 25 drug-related items during the subsequent search of the residence. (M.T. 10-11). No items were seized from Randolph's office. (M.T. 11-12). The only room which had been searched prior to the warrant issuing was the bedroom. (M.T. 20).

Randolph claimed that his wife was highly intoxicated from drinking heavily the preceding night, her face and eyes were red, her speech was slurred and she was unsteady on her feet. (M.T. 24-26, 33). However, no police officer detected an odor of alcohol about her or thought she was intoxicated. (M.T. 15, 45). Although Sergeant Murray described her as "a highly upset mother," she was not incoherent or incapable of giving consent due to any intoxication. (M.T. 45-46).

The trial court denied the motion to suppress in an order filed on October 17, 2002, specifically finding that Randolph's wife had "common authority to grant consent

for police to search the marital home." (J.A. 23). The trial court also found that she was "fully competent" to grant consent to search. (J.A. 23).

B. The Interlocutory Appeal

The trial court granted Randolph a certificate of immediate review, pursuant to O.C.G.A. § 5-6-34(b), of the order denying the motion to suppress. (R. 61). On November 26, 2002, the Court of Appeals of Georgia granted Randolph's request for an interlocutory appeal to review the trial court's ruling. (Pet. App. 8; R. 62).

On December 1, 2003, the Court of Appeals reversed the trial court's ruling, finding that where one occupant consents but the other occupant is present and objects to a search of an equally and jointly occupied premises, police must defer to the objecting occupant's position. (Pet. App. 9-10, 12). The appellate court found this precise question had not been addressed by this Court. (Pet. App. 9). The court found it was "reasonable" for one occupant to believe that his objection to a search would be honored by other occupants with equal rights in the premises. (Pet. App. 9). The court also found it was "reasonable" for police to defer to that objection. (Pet. App. 10). The court espoused the view that common authority over a premises "should permit a co-occupant to exercise privacy rights on behalf of all occupants." (Pet. App. 10).

Intertwined with this Fourth Amendment interpretation was the court's preference for a result that would promote the sanctity of marriage and avoid a rule that would create adversity. (Pet. 10). Although Georgia abolished the

"head of the household" doctrine in 1983,[3] the court noted that permitting "a wife's consent to search to overrule her husband's previous assertions of his right to privacy threatens domestic tranquility." (Pet. App. 11). *United States v. Matlock*, 415 U.S. 164 (1974), was viewed as establishing a "presumption" that one co-occupant has waived his right of privacy as to the other co-occupants only in his absence and that "presumption" did not stand where the occupant was present and asserted his Fourth Amendment rights by refusing to consent, particularly since the right purportedly involved was "the right to be free from police intrusion, not the right to invite police into one's home." (Pet. App. 12-13). Finally, the court noted the issue was not Mrs. Randolph's right to consent to a search, but whether she could waive "his" right to be free from a search and he clearly had not waived it. (Pet. App. 13).

The State of Georgia (hereinafter "the State") petitioned for review in the Georgia Supreme Court. (Pet. App. 1). The Georgia Supreme Court granted certiorari on April 28, 2004, to decide "whether an occupant may give valid consent to search common areas of a premises shared by another occupant who is present and objects to the search." *Id.*

On November 8, 2004, the Georgia Supreme Court affirmed the Court of Appeals' judgment, finding that where two persons have equal use and control of a premises, one

[3] *See* Ga. L. 1983, p. 1309, amending O.C.G.A. § 19-3-8 to continue interspousal tort immunity. Prior to 1983, O.C.G.A. § 19-3-8 provided, "The husband is head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except insofar as the law recognizes her separately, for her own protection, for her benefit, or for the preservation of public order."

occupant's consent to search the premises "is not valid" if the other occupant is present and objects to the warrantless search. (Pet. App. 1). That court interpreted *Matlock* as holding that an occupant with common authority over a shared premise could give valid permission for a search of that premises only in the absence of the other occupant, as "the risk assumed by joint occupancy" existed only in the latter's absence. (Pet. App. 2-3). The court concluded that police must obtain the consent of all occupants who are present before a search may occur in order to protect all individuals' Fourth Amendment rights. (Pet. App. 3).

The dissent interpreted *Matlock* as holding that the third-party consent rule applies even if the subject of the search is present and objects to the search, as consent is an established exception to the warrant requirement and a warrantless search without probable cause does not violate the Fourth Amendment if authorities have voluntary consent from one authorized to grant it. (Pet. App. 4-5). The dissent viewed *Matlock* as recognizing that the objecting occupant has no greater expectation of privacy because he had assumed the risk, through sharing the property, that another person would consent to a search. (Pet. App. 5).

The dissent declined to adopt a rule which made the refusal of one co-occupant to be "paramount" or which looked to the presence or absence of the defendant but would instead apply a rule which looked to whether the defendant had assumed the risk that a third party who had common authority over the shared premises "would permit inspection in his own right." (Pet. App. 5-6). The dissent opined that, once Mrs. Randolph gave valid consent to a search of the home she shared with him, that was sufficient. (Pet. App. 6).

The State's motion to stay the remittitur was granted on November 23, 2004. On April 18, 2005, this Court granted the State's petition for a writ of certiorari to review the Georgia Supreme Court's decision.

SUMMARY OF ARGUMENT

One who has common authority over a shared premises should be able to give police permission to search that premises in his or her own right, if that permission is voluntary. Nothing more should be required under the Fourth Amendment's touchstone of reasonableness.

A reduced expectation of privacy comes with sharing a house or an apartment with another and is inherent in the nature of joint occupancy itself. That reduced expectation of privacy does not spring into being simply because police ask for consent to search. For that reason, permitting police to obtain consent for a warrantless search from only one joint occupant does not infringe upon any reasonable expectation of privacy, even in the face of another occupant's refusal to consent.

ARGUMENT

ONE OCCUPANT CAN GIVE VALID CONSENT FOR LAW ENFORCEMENT TO SEARCH THE COMMON AREAS OF A PREMISES SHARED WITH ANOTHER, EVEN THOUGH THE OTHER OCCUPANT IS PRESENT AND OBJECTS TO THE SEARCH.

A "search" occurs under the Fourth Amendment "when an expectation of privacy that society is prepared to

consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). This Court has "long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991).

The issue for resolution here is whether the voluntary consent of one co-occupant with common authority over a premises is sufficient to permit police to conduct a search of common areas of that premises, despite the objections of another occupant who is present. Applying the long-established "totality of circumstances" test for ascertaining "valid consent" as well as third-party consent principles, the State of Georgia submits that the answer to this question is a resounding yes. One who has equal access to and control over a premises should be able to give police permission to search that premises in his or her own right if that permission is voluntary. Nothing more should be required under the Fourth Amendment's touchstone of reasonableness.

A reduced expectation of privacy comes with sharing a house or an apartment with another and is inherent in the nature of joint occupancy itself. That reduced expectation of privacy does not spring into being simply because police ask for consent to search. For that reason, permitting police to obtain consent for a warrantless search from one joint occupant does not infringe upon any reasonable expectation of privacy, even if another occupant is present and objects to the search.

This Court has consistently eschewed per se rules for determining reasonableness under the Fourth Amendment. That is why the per se approach adopted below,

which calibrates a co-occupant's expectation of privacy on his presence or absence from the premises when police ask for permission to search and which elevates one occupant's refusal above all else, is flawed. Whether police can obtain valid consent to search from one occupant of a jointly held premises should not turn upon the timing of the request to search. Instead, a totality of circumstances analysis should be employed.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." This Court has moved away from relying upon distinctions developed in property and tort law and looks to whether "the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *Katz v. United States*, 389 U.S. 347, 353 (1967). However, the Fourth Amendment generally bars a warrantless entry into a person's home. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Payton v. New York*, 445 U.S. 573 (1980).

To that end, a search conducted without a warrant issued upon probable cause is "presumptively unreasonable" unless it falls within one of the well-established exceptions: consent, exigent circumstances, or automobiles. *United States v. Karo*, 468 U.S. 705, 717 (1984). It is the consent exception that is involved in this case.

"[T]he search of property, without warrant and without probable cause, but with proper consent, is valid under the Fourth Amendment." *United States v. Matlock*, 415 U.S. 164, 165-66 (1974). Such consent may be obtained either from the person whose property is searched or "from a third party who possesses common authority over the

premises." *Illinois v. Rodriguez*, 497 U.S., at 181 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Matlock*, 415 U.S., at 171). Police may also obtain valid consent to search from a third person if police reasonably believed, at the time of the warrantless entry, that the third person had common authority over the premises but facts later show police were mistaken, using an objective standard. *Rodriguez*, 497 U.S., at 188-89.

Ordinarily, a defendant has the burden to show that his Fourth Amendment rights were violated by the challenged search or seizure. *Rakas v. Illinois*, 439 U.S., at 132. However, when the state seeks to rely upon consent to justify the lawfulness of the search, the state has the burden of proving that consent was freely and voluntarily given. *Schneckloth*, 412 U.S., at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

"Voluntariness" for consent to search does not turn on the presence or absence of a single criterion. *Schneckloth*, 412 U.S., at 226. Instead:

> [T]he question of whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.

Id., at 227. Knowledge of the right to refuse consent is simply one factor to be considered, as opposed to being a prerequisite for a voluntary search, as the weightier concern is that consent not be the result of coercion, threats, force or submission to a claim of lawful authority. *Id.*, at 227, 234.

Two "competing" concerns are accommodated in a totality of circumstances approach: "the legitimate need

for such searches and the equally important requirement of assuring the absence of coercion." *Id.*, at 227. As to the need for consent searches, this Court observed:

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.

Schneckloth, 412 U.S., at 227.

In establishing the test for determining valid consent, this Court also rejected the notion that "consent" to search was a "waiver" of a person's constitutional rights such that the waiver had to be judged under the knowing and intentional relinquishment standard of *Johnson v. Zerbst*, 304 U.S. 458 (1938), noting there was a "vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." *Schneckloth*, 412 U.S., at 235-42. A strict waiver standard for trial rights was adopted to insure that the defendant would receive a fair trial. *Id.*, at 241. The Fourth Amendment's protections "have nothing to do with promoting the fair ascertainment of truth at a criminal trial" but instead guard "the 'security of one's privacy against arbitrary intrusion by the police. . . .'" *Schneckloth*, 412 U.S., at 242 (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

A search cannot be said to be "somehow 'unfair'" if the person consented. *Schneckloth*, 412 U.S., at 242. There "is nothing constitutionally suspect in a person's voluntarily allowing a search." *Id.*, at 243. The Court noted that policies underlying the Fourth Amendment should not discourage citizens from helping to apprehend criminals and that a community has "a real interest" in encouraging

consent, as the search that ensued could yield needed evidence for solving and prosecuting a crime, and help make sure that an innocent person was not wrongly charged. *Schneckloth*, 412 U.S., at 243.

More importantly, the Court found that such a "waiver" approach to consent searches would be "thoroughly inconsistent" with decisions recognizing third-party consents, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971), where the wife voluntarily gave a gun and clothing that were her husband's to police; *Frazier v. Cupp*, 394 U.S. 731, 740 (1969), where evidence seized from a shared duffel bag was deemed admissible, as "the defendant had assumed the risk that his cousin, with whom he shared the bag, would allow the police to search it"; and *Hill v. California*, 401 U.S. 797, 801-805 (1971), where police validly seized evidence from the petitioner's apartment as incident to a third party's arrest where police had probable cause to arrest the petitioner and reasonably, but mistakenly, believed the person arrested was he. *Schneckloth*, 412 U.S., at 244. The Court concluded there was nothing in the purpose of the waiver requirements of *Johnson v. Zerbst* that justified equating "a knowing waiver with a consent search." *Schneckloth*, 412 U.S., at 246.

One year after defining what valid consent is, this Court dealt with who can consent and held that not only can the defendant give consent, but third persons with "common authority over or other sufficient relationship to the premises or effects sought to be inspected" can give permission for a warrantless search. *Matlock*, 415 U.S., at 171. In that case, Matlock was arrested in the front yard of a house leased to a married couple, and living in the home were the lessee wife, several of her children including her

daughter Mrs. Graff, Mrs. Graff's toddler son, and Matlock. *Matlock*, 415 U.S., at 166. Police knew Matlock lived there but never asked him for consent. Instead, arresting officers went to the door and were admitted into the house by Mrs. Graff, she was asked for and gave officers consent to search for money and a gun, she told police which bedroom she and Matlock occupied, and police found a gun and money in a diaper bag in the only closet in that room. *Id.*, at 166.

In beginning its legal analysis, this Court noted:

> It has been assumed by the parties and courts below that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial.

Matlock, 415 U.S., at 169.

Next, the Court noted that the question of whether a wife's permission to search a residence in which she resided with her husband "could 'waive his constitutional rights'" had been left open in *Amos v. United States*, 255 U.S. 313, 317 (1921), and that "more recent authority" clearly indicated that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Matlock*, 415 U.S., at 170 (citing *Frazier v. Cupp*, 394 U.S., at 740).

The Court noted *Schneckloth* had recognized that third-party consent cases, such as *Frazier* and *Coolidge*, supported the view that a consent search is "fundamentally different in nature from the waiver of a trial right." *Matlock*, 415 U.S., at 171.

> These cases at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained by a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Matlock, 415 U.S., at 171.

In a footnote, this Court made clear this "common authority" is not derived from property law but:

> [R]ests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S., at 171 n.7.

The question of consent to enter is to be judged against "an objective standard," looking at whether all the facts available to the officer at the moment would warrant a man of reasonable caution to believe that the consenting party had authority over the premises. *Illinois v. Rodriguez*, 497 U.S., at 188. This objective standard does not require complete factual accuracy, as probable cause to support a warrant is itself an "'assessment of probabilities in particular factual contexts.'" *Rodriguez*, 497 U.S., at 184 (quoting *Illinois v. Gates*, 462 U.S. 231, 232 (1983)). Instead, the Fourth Amendment requires "reasonableness" from magistrates and police in responding to the many factual situations that regularly arise in the search and

seizure context. *Rodriguez*, 497 U.S., at 185. Based upon that objective standard of reasonableness, this Court deemed valid a search conducted by police based upon the consent of a third person present at the apartment whom police reasonably believed at the time had common authority over the premises, but who, as subsequent facts revealed, did not.

In reaching that conclusion, this Court made clear that:

> What [the defendant] is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is "unreasonable."

Rodriguez, 497 U.S., at 183 (quoting the Fourth Amendment).

Applying these principles, the State submits that the per se rule adopted by the Georgia Supreme Court, requiring unanimous consent from all present cohabitants in order for police to conduct a search (Pet. App. 3), is clearly at odds with *Rodriguez*. That rule unequivocally guarantees that no search will occur unless the defendant consents, but this Court has not interpreted the Fourth Amendment as providing such assurance.

One element that can make a search of a person's house reasonable "is the consent of the person or his cotentant." *Rodriguez*, 497 U.S., at 184. The State submits police officers acted reasonably in asking for and relying upon the voluntary consent of Mrs. Randolph to search the couple's marital home. The information available to police indicated the couple was still married, they both lived in

the home, and she had just as much authority over the residence as did Randolph.

More importantly, Mrs. Randolph was not waiving Randolph's Fourth Amendment rights or consenting to a search of his property. She was authorizing police to search *their* property. Little, if any, consideration was given by the state appellate courts to this tenet of *Matlock*.

Had she simply avoided any verbal exchange with police about consent and elected instead to physically retrieve the straw with white residue on it from the upstairs bedroom where it had been in plain view, those voluntary actions would have been constitutionally permissible under *Coolidge*. However, because police asked Mrs. Randolph for her consent after her husband refused, the Georgia Supreme Court deemed her response to be irrelevant. The Fourth Amendment does not proscribe voluntary cooperation. *Florida v. Bostick*, 501 U.S. 429, 429 (1991). Her ability to cooperate with police by granting permission to search should not be restricted by a per se rule which looks only to her spouse's decision to grant or to refuse permission to search.

Were this Court to adopt the per se rule proposed by the Georgia courts, the attempts of joint occupants to cooperate with authorities and to give permission for warrantless searches would become legally irrelevant, as one occupant's refusal trumps all. In application, such a rule would thwart the ability of law enforcement officials to locate and seize evidence of a crime before evidence is destroyed.

The fallacy of the per se rule applied below is further highlighted by the information on which police sought consent to search: Mrs. Randolph told police Randolph

used large amounts of cocaine and "items of drug evidence" were in their home. There is no legitimate interest in possessing contraband, so that "government conduct that only reveals the possession of contraband compromises no legitimate privacy interest." *Illinois v. Caballes*, ___ U.S. ___, 125 S.Ct. 834, 837 (2005). The rule applied below unwittingly protects non-legitimate interests by looking only to one occupant's refusal, despite another occupant's consent and willingness to cooperate.

The State acknowledges that a different result might have ensued had Mrs. Randolph given consent for police to search her husband's law office, which was also in the Randolph home, and contraband was only found in the law office. Whether she had actual or apparent authority over the law office would become the issue. However, *Rodriguez* made clear that police do not have to accept every invitation to search and placed a duty upon law enforcement to make further inquiry if a reasonable person would doubt the truth of the third person's representations. *Rodriguez*, 497 U.S., at 188. Moreover, application of the "totality of circumstances" test would take such a factual distinction into account, instead of focusing, as did the Georgia appellate courts, on simply whether Randolph was present and objected to a search.

Instead of looking at whether Mrs. Randolph had common authority over the couple's home in order to exercise her own right to permit inspection, the state supreme court focused almost exclusively on Randolph's expectation of privacy and calibrated that privacy interest on his presence or absence from the home. The state supreme court deemed the "risk" assumed from jointly-occupied premises to be merely an inability to control access to the premises in one's absence. The court obviously

assumed that, if that occupant were at home, then he or she would have absolute control, as not only did the court apply a rule which gave Randolph total control of access to the home, but it made his refusal to consent paramount. Such an assumption is flawed, as no co-occupant can reasonably expect to have total control over a premises he or she shares with another. The Fourth Amendment should not be interpreted to recognize such an unreasonable expectation and one which ignores the rights of other occupants with access to and use of the premises as great as the defendant's.

The court below applied a per se rule that turned on the timing of the sergeant's request to search, rather than examining the totality of circumstances and considering whether Mrs. Randolph had common authority over the home in order to permit a search in her own right. The state court's approach ignores the reality that a co-occupant's reduced expectation of privacy simply grows out of sharing the premises with someone else, and not because police are there and ask for permission to enter.

The question presented is phrased in terms of two occupants because the consent issue arose from a domestic dispute involving a married couple. The answer to the question in this case, however, readily applies to all joint occupancy searches and will likely arise in contexts that transcend domestic relations and any "war on drugs." Of tantamount concern is a case involving child or spouse abuse, which has not yet ripened into exigent circumstances, and it is the abuser who refuses police access to check the premises for signs of abuse.

Finally, reasonableness is the touchstone of the Fourth Amendment. *United States v. Knights*, 534 U.S.

112, 118 (2001); *Bond v. United States*, 529 U.S. 334, 338 (2000); *Florida v. Jimeno*, 500 U.S., at 250; *California v. Ciraolo*, 476 U.S. 207 (1986); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S., at 360. Reasonableness is treated as a "function of the facts" because:

> [N]o template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.

United States v. Banks, 540 U.S. 31, 36 (2003).

The State submits it is reasonable for police to obtain and act upon the voluntary consent of one occupant with common authority to search the common areas of that premises, even if other occupants object. The occupant giving consent is not waiving anyone else's rights but is simply granting access to search the areas shared with others and in which there is an obvious reduced expectation of privacy. If a search authorized by one with apparent authority can be deemed reasonable, then surely the Fourth Amendment permits one with actual authority to give police valid permission to search, regardless of other occupants' positions. Such a rule flows logically from *Schneckloth*, *Matlock*, and *Rodriguez*.

CONCLUSION

WHEREFORE, the State of Georgia prays that the decision of the state appellate court be reversed and that a rule be adopted which makes one co-occupant's voluntary consent sufficient to authorize a warrantless search.

Respectfully submitted,

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No. 04-1067

In the Supreme Court of the United States

STATE OF GEORGIA, PETITIONER

v.

SCOTT FITZ RANDOLPH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an occupant may give law enforcement valid consent to search the common areas of premises shared with another when the other occupant is also present and objects to the search.

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In the Supreme Court of the United States

No. 04-1067

STATE OF GEORGIA, PETITIONER

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether an occupant may give law enforcement valid consent to search the common areas of premises shared with another when the other occupant is also present and objects to the search. Federal law enforcement officers frequently conduct searches of premises based on an occupant's consent. In addition, the federal government prosecutes cases in which evidence has been obtained pursuant to consent searches conducted by state authorities. The United States therefore has a significant interest in the Court's disposition of this case.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * ."

STATEMENT

1. In late May 2001, respondent Scott Fitz Randolph and his wife separated. Mrs. Randolph and their son went to stay in her parents' home in Canada. On or about July 4, 2001, Mrs. Randolph and her son returned to the marital residence in Americus, Georgia. Pet. App. 7.

On the morning of July 6, 2001, Mrs. Randolph called the local police department to report a domestic dispute with respondent. When officers arrived at the Randolphs' home, Mrs. Randolph appeared very upset and complained that respondent had taken their son away. She also told the officers that respondent's cocaine use had caused financial problems for the family, and that drugs were then on the premises. Respondent returned to the home within a few minutes. He told the officers that he had left their son with a neighbor because he was concerned that his wife would again leave the country with the child. Respondent also claimed that his wife was inebriated and was an alcoholic. Pet. App. 7-8; Pet. 3.

One of the officers accompanied Mrs. Randolph to the neighbor's house to retrieve the child. Upon their return, the officer asked respondent about Mrs. Randolph's allegations concerning his drug use. The officer also sought respondent's consent to search the residence, but respondent declined to give consent. The officer then asked Mrs. Randolph for consent to search the home, and she agreed. Mrs. Randolph led the officer to an upstairs bedroom, in which the officer saw a "piece

of cut straw" on a dresser. A closer examination revealed the presence of white residue on the straw, which led the officer to suspect that the straw had been used to ingest cocaine. Pet. App. 8.

After the officer retrieved an evidence bag from his car, Mrs. Randolph told him that she was withdrawing her consent to the search. The officer collected the straw and white residue and returned to the police station with respondent and Mrs. Randolph. The officer then obtained a search warrant for the Randolphs' home, and the ensuing search uncovered a number of additional drug-related items. Pet. App. 8; Pet. 3-4.

2. Respondent was indicted on a charge of possession of cocaine. He filed a motion to suppress the evidence seized from his home, arguing that the Fourth Amendment barred the search of his residence over his objection. On October 17, 2002, the trial court denied the motion, ruling that Mrs. Randolph had "common authority to grant consent for police to search the marital home." The court concluded that "one spouse can consent to a search of the marital premises, and the other spouse cannot withdraw that consent, regardless of the other spouse's presence or absence at the time the consent was given and knowledge of that consent being given." J.A. 23; Pet. App. 8.

The Georgia Court of Appeals, after granting respondent's application for an interlocutory appeal, reversed the trial court in a divided disposition. Pet. App. 7-47. The majority viewed the circumstances of this case as "exceedingly close" (*id.* at 9) to those in *United States* v. *Matlock*, 415 U.S. 164 (1974). *Matlock* held that officers could conduct a warrantless search of the defendant's home based on the consent of another occupant who possessed joint authority over the premises. Nonetheless,

the Georgia Court of Appeals distinguished *Matlock* on the ground that, here, respondent "was not only present" at his home at the time of the search, but he also had "affirmatively exercised" his Fourth Amendment rights "by refusing to consent to the search." Pet. App. 12.

The dissent concluded that there was no material distinction between this case and *Matlock*. Pet. App. 26-47. The dissent reasoned that, because Mrs. Randolph "shared full dominion over the marital household with [respondent] and the bedroom in which the contraband was discovered," respondent had "assumed the risk that his wife would consent to the search of the home." *Id.* at 47.

3. The Supreme Court of Georgia affirmed in a divided opinion. Pet. App. 1-6. The majority explained that it was "faced with a situation in which two persons have equal use and control of the premises to be searched." *Id.* at 1. In those circumstances, the majority concluded, "the consent to conduct a warrantless search * * * given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene." *Ibid.* In the majority's view, *Matlock* was grounded in the understanding that "one co-inhabitant * * * assume[s] the risk that a second co-inhabitant will consent to a search of common areas in the absence of the first co-habitant." *Id.* at 2-3. But "the risk assumed by joint occupancy goes no further," the majority believed, in that "the risk 'is merely an inability to control access to the premises during one's absence.'" *Id.* at 3 (quoting 3 Wayne R. LaFave, *Search & Seizure* § 8.3(d), at 731 (3d ed. 1996)). The majority therefore held that, "should the cohabitant be present and able to object, the police must also obtain the

cohabitant's consent." *Ibid.* (quoting *State* v. *Leach*, 782 P.2d 1035, 1040 (Wash. 1989)).

Three Justices dissented from the majority's holding. Pet. App. 3-6. The dissent believed that the correct approach under *Matlock* is to look "not to the defendant's presence or absence" at the scene, but instead "to whether * * * he assumed the risk that the third party who possessed common authority over the premises would permit inspection in [her] own right." *Id.* at 5-6. Here, the dissent explained, respondent, in jointly occupying the home with his wife, had "assumed the risk that * * * she would expose their common private area to such a search" and "that his opposition to the presence of police in his home would not override his wife's consent." *Id.* at 6 (citation, internal quotation marks, and brackets omitted).

SUMMARY OF ARGUMENT

When a residence is jointly occupied by two persons with equal authority over the premises, the Fourth Amendment permits a search based on the consent of either one. *United States* v. *Matlock*, 415 U.S. 164 (1974); *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). There is no basis for carving out an exception to that rule for cases in which both occupants are present at the time of the search, and one occupant consents while the other objects.

The foundational premise of the law of consent searches is that an individual may make a voluntary decision to permit the police to inspect property over which she has control. That principle applies when one party consents to a search of jointly held property, because each joint occupant has the right to grant access to the premises and each assumes the risk that a co-oc-

cupant will allow the authorities to enter. The validity of such a consent does not rest on any notion that each individual implicitly grants an agency authority to his co-occupants. Rather, it rests on the more basic principles that each co-occupant may grant consent, that a consent search constitutes an important law enforcement tool, and that there is a strong social interest in respecting the independent decision of a co-occupant to exercise her authority to permit a search.

The Georgia Supreme Court in this case announced a different rule for cases in which both joint occupants are present at the time of the search. In that situation, the court held, officers must solicit and obtain the consent of both occupants. There is no sound basis for requiring law enforcement to take that step. Such a requirement would be at odds with the facts in both *Matlock* and *Rodriguez*. In both cases, the defendant was *not* consulted, even though he was present at the scene; rather, officers searched the defendant's residence based solely on the consent of a third party who shared (or was believed to share) authority over the premises.

A requirement to obtain the consent of both occupants when both are present would also be at odds with general Fourth Amendment principles. Individual privacy interests are inherently qualified when an individual chooses to live with another person. An individual has no reasonable expectation that his co-occupant will not permit law enforcement to conduct a search. An analogous situation exists when one party to a telephone conversation consents to monitoring by law enforcement. Even though both individuals are "present" in the conversation and have privacy interests in it, the Court has made clear that the consent of one party is sufficient to validate the "search." See *United States* v. *White*, 401

U.S. 745 (1971). The same analysis applies here, where "*both* [co-occupants] share the power to surrender each other's privacy to a third party," such that "either may give effective consent" to a search. *United States* v. *Karo*, 468 U.S. 705, 726 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

A rule requiring the consent of a joint occupant when he happens to be on the premises would enhance privacy interests based only on an accident of timing, while frustrating legitimate societal interests. Adopting a rule based on happenstance would encourage law enforcement to base decisions on timing considerations—such as the likelihood that a potentially objecting party will be present—rather than on law enforcement concerns. Allowing the objection of one occupant to thwart the consent of another might also prevent an innocent occupant from disassociating herself from her co-occupant's involvement in crime. Comparable concerns would arise when the consenting occupant has been the victim of abuse by a co-occupant who is present and unwilling to give consent. In such situations, a sound balancing of the competing interests supports validating the voluntary consent of the joint occupant who desires to cooperate in a law enforcement investigation.

For similar reasons, it would be unsound to attach dispositive significance to the fact that a co-occupant who is on the premises makes an explicit objection. *Matlock* itself makes clear that each co-occupant has an independent right to consent to a search; the objection of one occupant thus does not negate the consent of another. In addition, a rule that would give controlling weight to an affirmative objection is inconsistent with general Fourth Amendment principles, which do not put the onus on a property owner to voice an objection.

Such a rule would logically suggest (contrary to the facts of *Matlock* and *Rodriguez*) a prohibition on a consent search when an occupant is known to be present and has not been given a meaningful opportunity to voice an objection. It could also logically imply that the police must attempt to track down an off-site occupant to ascertain his views. Such complications underscore the flaws in an approach that fails to validate the choice of a co-occupant to consent to a search.

Applying those principles here, the search of respondent's residence was valid. Respondent's wife was found to have "joint access or control [of the residence] for most purposes," *Matlock*, 415 U.S. at 171 n.7, and her consent therefore validly supported the search.

ARGUMENT

OFFICERS MAY SEARCH A RESIDENCE BASED ON THE CONSENT OF ONE OCCUPANT NOTWITHSTANDING THAT ANOTHER OCCUPANT WHO SHARES THE PREMISES IS ALSO PRESENT AND OBJECTS TO THE SEARCH

Although the "Fourth Amendment generally prohibits the warrantless entry of a person's home," the "prohibition does not apply * * * to situations in which voluntary consent has been obtained." *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). When two persons possess joint authority over the premises, either may give effective consent for a search. *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974); see *Rodriguez*, 497 U.S. at 179. Contrary to the conclusion of the Georgia Supreme Court below, the authority of a joint occupant to give valid consent to a search is not vitiated when the other occupant is also present and objects to the search. The courts of appeals that have considered the issue have

uniformly reached that conclusion,[1] as have a decided majority of state courts.[2]

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[1] See *United States* v. *Lewis*, 386 F.3d 475, 481 (2d Cir. 2004), cert. denied, 125 S. Ct. 1355 (2005); *United States* v. *Morning*, 64 F.3d 531, 533-536 (9th Cir. 1995), cert. denied, 516 U.S. 1152 (1996); *Lenz* v. *Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995); *United States* v. *Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States* v. *Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979); *United States* v. *Bethea*, 598 F.2d 331, 335 (4th Cir.), cert. denied, 444 U.S. 860 (1979); *United States* v. *Sumlin*, 567 F.2d 684, 687-688 (6th Cir. 1977), cert. denied, 435 U.S. 932 (1978); see also *United States* v. *Aghedo*, 159 F.3d 308 (7th Cir. 1998) (defendant was present and did not consent or object); *United States* v. *Baldwin*, 644 F.2d 381, 383 (5th Cir. 1981) ("Although Baldwin previously had refused consent, his wife could still consent to a search of the automobile where, as here, it appeared she had at least joint control over the auto.").

[2] See *Love* v. *State*, 138 S.W.3d 676, 680 (Ark. 2003); *People* v. *Sanders*, 904 P.2d 1311, 1313 (Colo. 1995); *State* v. *Zimmerman*, 529 N.W.2d 171, 174 (N.D. 1995); *City of Laramie* v. *Hysong*, 808 P.2d 199 (Wyo. 1991); *People* v. *Haskett*, 640 P.2d 776, 785-787 (Cal. 1982); *In re Anthony F.*, 442 A.2d 975, 978-979 (Md. 1982); *Commonwealth* v. *Ploude*, 688 N.E.2d 1028, 1029-1031 (Mass. App. Ct. 1998); *State* v. *Ramold*, 511 N.W.2d 789, 792-793 (Neb. Ct. App. 1994); *Brandon* v. *State*, 778 P.2d 221, 223-224 (Alaska Ct. App. 1989); *People* v. *Callaway*, 522 N.E.2d 337, 342-343 (Ill. App. Ct. 1988); *State* v. *Washington*, 357 S.E.2d 419, 426-427 (N.C. Ct. App. 1987) (dictum); *State* v. *Frame*, 609 P.2d 830 (Or. Ct. App. 1980), cert. denied, 450 U.S. 968 (1981); *People* v. *Cosme*, 397 N.E.2d 1319 (N.Y. 1979); see also *Welch* v. *State*, 93 S.W.3d 50 (Tex. Crim. App. 2002) (automobile). But see *State* v. *Leach*, 782 P.2d 1035 (Wash. 1989); cf. *In re D.A.G.*, 484 N.W.2d 787 (Minn. 1992) (invalidating search when consenting occupant was absent and police did not ask consent of defendant who was present); *Silva* v. *State*, 344 So.2d 559 (Fla. 1977) (declining to give effect to wife's consent over husband's objection but explaining, *inter alia*, that she did not have common authority over closet).

A. An Occupant Of Premises Shared With Another May Give Valid Consent For A Search Of The Common Areas

1. As this Court has long recognized, "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies," and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228, 231-232 (1973). In some situations, "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227; see *id.* at 243. The Court therefore has sought to avoid imposing "artificial restrictions" on consent searches that "would jeopardize their basic validity." *Id.* at 229. In part to preserve the value of consent searches, the Court in *Schneckloth* held that consent to search is validly given as long as it appears from the totality of circumstances that the consent was voluntary; there is no requirement that the individual was aware of his Fourth Amendment rights and voluntarily waived them. *Id.* at 235-248 (distinguishing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938)).

Consistent with the view that the validity of a consent search does not rest on notions of a waiver of Fourth Amendment rights, an individual need not personally consent to a search of his property for a consent search of the property to be valid. Rather, the search is valid if based on the consent of a third party who jointly possesses the individual's premises or effects. See *Frazier* v. *Cupp*, 394 U.S. 731 (1969). *Frazier* upheld a search of the defendant's duffel bag on the ground that consent had been obtained from his cousin, who "was a joint user of the bag" and thus "clearly had authority to consent to its search." *Id.* at 740. The Court explained that the defendant, "in allowing [his cousin] to use the

bag and leaving it in his house, must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Ibid.* Subsequently, in *Schneckloth*, the Court explicitly assumed "the constitutional validity of third-party consents," 412 U.S. at 246 n.34, and it declined to require proof of a knowing and voluntary waiver in part because that approach "would be throughly inconsistent with [its] decisions that have approved 'third party consents,'" *id.* at 245.

2. In *United States* v. *Matlock*, 415 U.S. 164 (1974), the Court applied third-party consent principles to the search of an individual's home. Although the officers in *Matlock* had not sought or obtained the defendant's consent before conducting a warrantless search of his residence, *id.* at 166, the Court held that the search could be sustained over his challenge based on the consent of the woman who had been living there with him. The Court explained that, "when the prosecution seeks to justify a warrantless search by proof of voluntary consent," it need not show that "consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority or other sufficient relationship to the premises." *Id.* at 171. The Court explained that the common "authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements." *Id.* at 171 n.7; accord *Chapman* v. *United States*, 365 U.S. 610, 617 (1961). Rather, the authority "rests on mutual use of the property by persons generally having joint access or control for most purposes." *Matlock*, 415 U.S. at 171 n.7. In such circumstances, the Court concluded, "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed

the risk that one of their number might permit the common area to be searched." *Ibid.*

In *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990), the Court extended the *Matlock* rule to circumstances in which the third party has apparent authority to consent to a search of the premises. In that case, as in *Matlock*, the officers did not seek the defendant's consent to enter his residence, but instead obtained the consent of a third party believed to live there with him. The Court reiterated the holding of *Matlock* that a warrantless search of a person's home is valid "when voluntary consent has been obtained * * * from a third party who possesses common authority over the premises." *Id.* at 181; see *id.* at 179, 183-184. The Court explained that a search is reasonable under the Fourth Amendment when searching officers reasonably believe that the third party possesses adequate authority over the premises, even if it is later discovered that the party in fact did not reside there. *Id.* at 183-189.

B. The Authority Of One Occupant To Permit A Search Of Premises Jointly Possessed With Another Is Not Vitiated By The Presence Of The Other Occupant

The Georgia Supreme Court acknowledged the rule of *Matlock* that officers may conduct a warrantless search of a person's home based on the consent of another occupant who jointly occupies the premises. Pet. App. 2. In the court's view, however, *Matlock*'s principle is limited to cases in which the other occupant is absent from the premises at the time. When both occupants are present, the court believed, officers must obtain the consent of each before commencing a warrantless search. *Id.* at 3. The court reasoned that the "risk assumed by joint occupancy" is "merely an inability to control access

* * * during one's absence." *Ibid.* (internal quotation marks omitted). Contrary to the conclusion of the court below, there is no sound basis for carving out an exception to the *Matlock* rule for cases in which both occupants are present at the scene and one consents while the other objects.

Indeed, a presence-based exception is at odds with the facts of both *Matlock* and *Rodriguez*. In *Matlock*, the officers arrested the defendant "in the yard in front" of the house in which he was living, and they placed him in a parked squad car while they obtained consent to search the home from the woman who resided there with him. 415 U.S. at 166; see Pet. App. 11a, J.A. 6, 19, *United States* v. *Matlock*, *supra* (No. 72-1355). In *Rodriguez*, the officers were told by a woman that she had been assaulted by the defendant and that he was then asleep in the apartment she shared with him. 497 U.S. at 179-180. The officers entered the apartment based on her consent alone despite having been told that the defendant was present at the time. In both *Rodriguez* and *Matlock*, the Court held that the officers' entry could be sustained based solely on the consent of a third party who shared the premises with the defendant, notwithstanding that the defendant was known to be present in the residence (*Rodriguez*) or at the scene (*Matlock*).[3]

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[3] The opinion in *Matlock* includes the following statement: "the consent of one who possesses common authority over premises or effects is valid as against the *absent*, nonconsenting person with whom that authority is shared." 415 U.S. at 170 (emphasis added). Although that particular statement assumes the absence of the nonconsenting occupant, the statement "was embedded in a discussion of cases in which the Court addressed issues previously undecided." *United States* v. *Rith*, 164 F.3d 1323, 1328 (10th Cir.), cert. denied, 528 U.S. 827 (1999). The Court's ultimate articulation of the controlling principle was framed more broadly. See *Matlock*, 415 U.S. at 171 (finding it

The presence-related exception adopted by the Georgia Supreme Court not only fails to square with the factual circumstances addressed in *Matlock* and *Rodriguez*, but it also is unsound as a matter of principle. Whether a search is reasonable under the Fourth Amendment is generally determined by balancing its intrusion on the individual's privacy interests against its promotion of legitimate governmental interests. See, *e.g.*, *Wyoming* v. *Houghton*, 526 U.S. 295, 299-300 (1999); *Veronia School Dist. 47J* v. *Acton*, 515 U.S. 646, 652-653 (1995). *Matlock* and *Rodriguez* establish that the reasonableness requirement is ordinarily satisfied when officers search a home based on the consent of an occupant who has common authority over the premises. See *Rodriguez*, 497 U.S. at 183-184 ("There are various elements, of course, that can make a search of a person's house 'reasonable'—one of which is the consent of the person *or his cotenant*.") (emphasis added). As a general matter, moreover, a home-owner's Fourth Amendment protections do not depend on whether she is present on the property. There is no sound basis for a different rule that would make the validity of an occupant's consent

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"clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent," it "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises"). See also *id.* at 169 (endorsing assumption "that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant"). Several courts have understood that the defendant was present at the scene in *Matlock*, and have concluded that an individual's presence thus cannot vitiate the valid consent of a third party who shares the premises with him. See *United States* v. *Childs*, 944 F.2d 491, 494 (9th Cir. 1991); *Sumlin*, 567 F.2d at 687; *Sanders*, 904 P.2d at 1314 n.5.

depend on whether the other occupant is present on the premises.

1. The risk assumed by a joint occupant that his co-occupant may consent to a search does not dissipate when he is also on the premises

a. Applying the *Matlock* rule when both occupants are present on the premises does not intrude on legitimate privacy interests. As *Matlock* explains, the authority of one occupant to permit a search of premises jointly possessed with others is rooted in the understanding that "the others have assumed the risk that one of their number might permit the common area to be searched." 415 U.S. at 171 n.7. The risk assumed by a joint occupant does not vary depending on whether he happens to be present when a co-occupant gives consent to a search. Rather, the risk inheres in the nature of a common occupancy and persists for the duration of the arrangement. Each occupant has an independent right to decide for herself to cooperate with the authorities by permitting a search of property she jointly controls; neither occupant has a veto power over that choice.

By entering into a joint occupancy, an individual relinquishes any unilateral entitlement to determine whom to allow on the premises and when to permit entry. "Although there is always the fond hope that a co-occupant will follow one's known wishes, the risks remain. A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence." *United States* v. *Morning*, 64 F.3d 531, 536 (9th Cir. 1995), cert. denied, 516 U.S. 1152 (1996). A joint occupant thus has no reasonable expectation that he retains absolute authority to prevent a co-occupant from permitting access to the jointly held

property, without regard to whether he is on the premises.[4]

Respondent suggests that one occupant can be considered to consent on behalf of a co-occupant when the latter is absent from the property, but that there is no reason to give effect to the consent of one occupant alone when both are present. See Br. in Opp. 3. That argu-

[4] Although *Matlock* observes that the authority of a third party to give effective consent to a search does not rest on the particularities of a cotenant's rights under the law of property, 415 U.S. at 171 n.7, a cotenant's inability to preclude a search consented to by another cotenant is consistent with the common law. A general principle of property law is that one cotenant has no right to exclude another cotenant from the premises, or to prevent the other cotenant from leasing the latter's rights in the property to a third party. See *Morning*, 64 F.3d at 536 n.6 ("[I]n general, co-tenants are entitled to full enjoyment of the joint property, and are not allowed to exclude the other co-tenants from it."); 7 *Powell on Real Property* § 50.06[4] (Michael Allen Wolf ed. 2005) ("Without consent of cotenants, each tenant in common may sell or encumber his or her property interest, and thus inject a stranger into the cotenancy.").

Of particular significance, under the common law of trespass, "[i]t is ordinarily held that a tenant in common may properly license a third person to make an entry on the common property, and the licensee, in making an entry in the exercise of his or her license, is not liable in trespass to nonconsenting cotenants." 86 C.J.S. *Tenancy in Common* § 135 (1997); see *Buchanan* v. *Jencks*, 96 A. 307, 309, 310-311 (R.I. 1916) ("[I]t would seem unreasonable to say that a cotenant could not authorize another to go upon the common land and do anything that he might do himself."); *Granger* v. *Postal Tel. Co.*, 50 S.E. 193 (S.C. 1905); *Harris* v. *City of Ansonia*, 47 A. 672, 673 (Conn. 1900); *Lee Chuck* v. *Quan Wo Chong*, 28 P. 45 (Cal. 1891); see also *Dinsmore* v. *Renfroe*, 225 P. 886 (Cal. Ct. App. 1924); *Causee* v. *Anders*, 20 N.C. 388 (1839) (affirming that tenant in common has right to enter property and take with him a guest). But see *Moore* v. *Moore*, 34 P. 90, 92 (Cal. 1893). In fact, "a cotenant who ejects a third person entering under such license is liable to him in trespass." 86 C.J.S., *supra*, § 135. The Georgia Supreme Court's result is in tension with those rules.

ment misconceives *Matlock*'s basis for giving effect to the consent of a third party who shares authority over the premises. The Court did not rely on an agency-related theory under which the validity of the third party's consent reflects an assumption that she acts on her co-occupant's behalf—in which case the latter's presence at the scene might negate any justification for the assumption. The Court instead relied on the understanding that the "mutual use of the property by persons generally having joint access or control" makes it "reasonable to recognize that any of the co-inhabitants has the right to permit the inspection *in his own right*." 415 U.S. at 171 n.7 (emphasis added); see *United States* v. *McAlpine*, 919 F.2d 1461, 1464 n.2 (1990) ("agency analysis [was] put to rest by the Supreme Court's reasoning in *Matlock*").[5]

b. The risk assumed by a joint occupant is comparable to the risk assumed "when an individual reveals private information to another," and the "well settled" rule in that context is that the disclosing individual "assumes the risk that his confidant will reveal that information to the authorities." *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984). An individual who shares information with another, even under a promise of confidentiality, forfeits the ability to preclude that person from sharing the information with law enforcement. Likewise, the Fourth Amendment permits law enforcement officers to obtain the consent of an individual to monitor his private

[5] Respondent also suggests (Br. in Opp. 3) that the *Matlock* rule is based on the practical need to avoid requiring officers to determine every occupant who is present on the premises. Although that concern undoubtedly is valid, it cannot alone explain the *Matlock* rule: in the facts of *Matlock* itself, officers not only knew of Matlock's presence but arrested him in the front yard of his residence.

conversations with another person, including conversations that take place in the latter person's home, on his private telephone, or in some other place in which he generally would possess a substantial privacy interest. See *United States* v. *White*, 401 U.S. 745 (1971); *Hoffa* v. *United States*, 385 U.S. 293 (1966); *On Lee* v. *United States*, 343 U.S. 747 (1952).

Just as an individual assumes the risk that persons with whom he speaks will disclose the information to the authorities or permit law enforcement to monitor their communications, a joint occupant analogously assumes the risk that a co-occupant will permit law enforcement officers to inspect their commonly held premises. The fact that both individuals are "present" in the case of an intercepted communication does not give rise to a right in both to be asked by law enforcement for consent; either participant's consent is sufficient. See *United States* v. *Karo*, 468 U.S. 705, 716 n.4 (1984) ("A homeowner takes the risk that his guest will cooperate with the Government."). Likewise, that an individual may be present at his home when a co-occupant elects to permit a search of the premises does not detract from the consenting co-occupant's authority; either occupant's consent is sufficient. In a concurring opinion in *Karo*, Justice O'Connor embraced precisely that analysis, finding it a "relatively easy case * * * when two persons share identical, overlapping privacy interests in a particular place, container, or conversation." *Id.* at 726 (O'Connor, J., concurring in part and concurring in the judgment). In that situation, she explained, whether two persons have a joint interest in a "particular place" or a "conversation," the controlling principle is the same: "*both* share the power to surrender each other's privacy to a

third party," and "either may give effective consent" to a search. *Ibid.*[6]

c. Under the approach of the Georgia Supreme Court, the authority of an occupant to give effective consent to a search would turn on a happenstance: whether the other occupant is also present at the time. Fourth Amendment protections, however, should not fluctuate based on accidents of timing in an occupant's presence or provision of consent. Cf. 4 Wayne R. LaFave, *Search and Seizure* § 8.3(d), at 162 (4th ed. 2004) ("[A] person against whom a search is directed should not lose his fourth amendment rights simply because he is not fortuitously present at the time consent was requested.") (internal quotation marks omitted). The Fourth Amendment generally does not require a property owner to voice an affirmative objection to a search, let alone be present to object. Yet the Georgia Supreme Court made that chance event the controlling consideration.

The normal rule, accordingly, is that a person's authority to prevent a search of his property does not vary depending on whether he happens to be present on the premises. See 6 LaFave, *supra*, § 11.3(a), at 131-132.

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[6] In concluding that the risk assumed by a joint occupant exists only when he is away from the premises, the Georgia Supreme Court relied on Professor LaFave's *Search and Seizure* treatise. See Pet. App. 3. The treatise, however, does not reach a definitive conclusion on the issue in this case. After describing the competing views, the treatise states that "there is merit to both positions," but finds "somewhat greater appeal" in the approach adopted by the court below. 4 Wayne R. LaFave, *Search and Seizure* § 8.3(d), at 159 (4th ed. 2004). And even with respect to that equivocal statement, the treatise later suggests that valid consent may exist in circumstances like those in this case, where "the consenting occupant acts to allow police seizure of items of contraband" that she "might otherwise have later been charged with possessing." *Id.* at 161-162.

Cf. *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel clerk could not validly consent to search of customer's room despite customer's absence at the time); *Chapman*, 365 U.S. at 610 (landlord could not validly consent to search of tenant's home despite tenant's absence at the time). Generally, regardless of the person's presence or absence at the time, a search cannot intrude on legitimate privacy expectations absent valid consent. As to that question of consent, *Matlock* and *Rodriguez*—both of which in fact involved a defendant who was present, see p. 13, *supra*—establish that consent may be obtained "either from the individual whose property is searched * * * or from a third party who possesses common authority over the premises." *Rodriguez*, 497 U.S. at 181 (citation omitted).

2. Denying an occupant the ability to give effective consent when her co-occupant is present would frustrate legitimate societal interests

The Court explained in *Schneckloth* that it "is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." 412 U.S. at 243 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488 (1971)). Instead, "the community has a real interest in encouraging consent, for resulting search may yield necessary evidence for the solution and prosecution of crime." *Ibid.* The approach of the Georgia Supreme Court would disserve those interests by allowing one occupant to thwart the ability of another occupant to cooperate with law enforcement and facilitate the investigation of crime. And "[i]n situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search

authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227.

In addition to the general interest in contributing to the investigation of crime, an individual may have significant reasons of her own for consenting to a search. One situation in which an occupant may have particular reason for coming forward is if her co-occupant is concealing contraband within the shared premises. See, *e.g.*, *People* v. *Cosme*, 397 N.E.2d 1319 (N.Y. 1979); *State* v. *Frame*, 609 P.2d 830 (Or. Ct. App. 1980). Because of the possibility that she would be perceived guilty by association or that her co-occupant would attempt to shift the blame, the risk of being arrested or "being convicted of possession of drugs one knows are present and has tried to get the other occupant to move is by no means insignificant." 4 LaFave, *supra*, § 8.3(d), at 162 n.72; see *Schneckloth*, 412 U.S. at 243 (noting "interest in encouraging consent" because evidence "may insure that a wholly innocent person is not wrongly charged"). Cf. *Maryland* v. *Pringle*, 540 U.S. 366 (2003) (discovery of drugs in car can give rise to probable cause for the arrest of all occupants).

As one court has explained in upholding a search based on a third party's consent in such circumstances, "[i]t would be a harsh doctrine, indeed, that would prevent an innocent pawn from removing the taint of suspicion which had been cast upon him by a defendant's [actions]." *United States* v. *Botsch*, 364 F.2d 542, 547 (2d Cir. 1966), cert. denied, 386 U.S. 937 (1967); 4 LaFave, *supra*, § 8.3(d), at 161-162.[7] And putting aside the possi-

[7] See also *United States* v. *Diggs*, 544 F.2d 116, 120-121 (3d Cir. 1976) ("[T]he right of the custodian of the defendant's property who has been unwittingly involved by the defendant in his crime to exculpate himself promptly and voluntarily by disclosing the property and

bility of exigent circumstances justifying a warrantless entry, giving effect to an occupant's consent may be necessary to avert destruction of contraband by the nonconsenting occupant. Cf. *Illinois* v. *McArthur*, 531 U.S. 326 (2001) (finding reasonable a temporary restraint on occupant's entry into his premises where officers had probable cause and were in the process of securing a warrant for destructible contraband).

Another situation that involves heightened interest in validating an occupant's consent arises when her consent is given in connection with allegations of abuse at the hands of her co-occupant. Several of the reported decisions considering the ability of a third party to give effective consent against a co-occupant involve that situation. See *Rodriguez*, 497 U.S. at 179; *United States* v. *Donlin*, 982 F.2d 31 (1st Cir. 1992); *United States* v. *Hendrix*, 595 F.2d 883 (D.C. Cir. 1979); *People* v. *Sanders*, 904 P.2d 1311 (Colo. 1995). A co-occupant whose own actions are alleged to have placed the consenting occupant at risk should not be permitted to negate the other person's consent to an entry and search. See 4 LaFave, *supra*, § 8.3(d), at 161 ("There is much to be said for the proposition that where the defendant has victimized the third party," the "emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant's objections.") (citation and internal quotation marks omitted).

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explaining his connection with it to government agents, must prevail over any claim of the defendant to have the privacy of his property maintained against a warrantless search by such agents."); *United States* v. *Cataldo*, 433 F.2d 38, 40 n.2 (2d Cir.) (upholding roommate's consent to search bedroom shared with defendant in part because consenting party "had a valid right to prove to the agents that he was not harboring a fugitive"), cert. denied, 401 U.S. 977 (1970).

Finally, the approach of the Georgia Supreme Court could detract from the efficient conduct of law enforcement investigations. Because an occupant's ability to give effective consent would be conditioned on her co-occupant's absence from the premises, the rule adopted below would give officers an incentive to adjust the timing of a request for consent. For instance, if officers have probable cause for an arrest, they could arrest the subject and remove him from the scene before seeking consent to search from a co-occupant. Cf. *Matlock*, 415 U.S. at 166. If officers lack probable cause for an arrest, they could wait for an objecting occupant to leave before seeking consent from a cooperating co-occupant.[8] A rule that could encourage those sorts of measures would impair efficient investigations without serving any valid countervailing purpose. That result would be at odds with the concern expressed in *Schneckloth* to avoid imposing undue restrictions on consent searches. See 412 U.S. at 228, 243.

C. The Ability Of An Occupant To Consent To A Search Should Not Turn On Whether Her Co-Occupant Makes An Explicit Objection

The Georgia Supreme Court held that officers must obtain the consent of each co-occupant who is on the premises. Pet. App. 3. But the court also pointedly referred to the fact that petitioner explicitly objected to the search. *Id.* at 2. An approach that attaches signifi-

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[8] Insofar as officers are encouraged to wait for the suspect to leave the premises before obtaining consent to a search, the outcome would be contrary to their interest in keeping the suspect at the scene to facilitate an arrest if the search uncovers incriminating evidence. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) (upholding detention of owner of premises during execution of search warrant).

cance to whether an affirmative objection was made is unsound and inconsistent with general Fourth Amendment principles.

The fact that an occupant expresses an objection to a search would matter if, in the absence of such an objection, it is assumed that all occupants agree to be bound by a consenting party's action. But *Matlock* plainly does not rest on any such assumption. Instead, the Court explained that the consenting occupant has an independent right to permit a search of her own accord, and that her co-occupants have assumed the risk that she might do so against their wishes, whether express or implied. See 415 U.S. at 171 n.7. Indeed, any assumption that the co-occupants are in agreement would be particularly unwarranted in view of the fact that third-party consent issues often arise when the consent is aimed to facilitate an investigation against a co-occupant. In *Rodriguez*, for instance, the officers entered the defendant's apartment after his presumed co-occupant had told officers that she had been assaulted by the defendant earlier that day. There would be no basis in that context for assuming that the defendant agreed with her decision to consent to an entry. Rather, it would seem much more likely to assume that the sleeping Rodriguez would have objected if roused. Likewise, it seems realistic to assume that the arrested defendant in *Matlock* would have objected if he had been asked for consent while sitting in the patrol car. In light of the facts in the Court's prior cases, it would be odd for the constitutional rule to turn on the extent to which an objection was made explicit.

Because a co-occupant has the right to consent to a search of the jointly-occupied premises and the joint occupants have assumed the risk that a co-occupant

might permit a search of the premises against their interests or wishes, the fact that the occupant makes explicit his objection to a search does not change the analysis. As one court has explained, "[w]e cannot see how the additional fact of [the defendant's] * * * refusal to consent in any way lessened the risk assumed that his co-occupant would consent. This additional fact does not increase a reasonable expectation of privacy." *United States* v. *Sumlin*, 567 F.2d 684, 688 (6th Cir. 1977); accord *Morning*, 64 F.3d at 536; *Hendrix*, 595 F.2d at 885.

More broadly, the Georgia Supreme Court's emphasis on an explicit consent is inconsistent with general Fourth Amendment principles. The normal rule is that a home-owner need not object explicitly to preserve his Fourth Amendment rights. Rather, the burden is on law enforcement to obtain his valid consent. See pp. 19-20, *supra*. But where, as here, a consent to search the premises has been given by someone entitled to grant it, the objection of a co-occupant makes no difference, whether the objection is explicitly stated or merely presumed. Indeed, in light of the general principle that the burden is on law enforcement to obtain consent rather than on the property owner to object, the decision below is in tension with settled law including *Matlock*. If a joint occupant's explicit objection were material, it might suggest that officers who know of another occupant's presence on-site would be required to obtain his consent before proceeding with a warrantless search. Such a rule might logically also be extended to require that officers attempt to track down an off-site joint-occupant to ascertain his views. An "objecting-occupant-prevails" rule might also cast doubt on the result in cases in which an occupant who is known to be present on the premises lacks a meaningful opportunity to make an explicit ob-

jection.[9] Those complications confirm the analytical defects in an approach that would accord dispositive significance to an explicit objection.

Whether an occupant affirmatively objects to a search thus should not bear on the analysis. Rather, the salient question is whether officers are required to obtain the occupant's consent even though they already have the consent of a third party who possesses common authority over the premises. As to that question, Fourth Amendment principles lead to the conclusion that officers can conduct a search upon securing the consent of an occupant who shares the premises with another, regardless of the other occupant's presence at the scene or his explicit objection to a search.

D. The Search Of Respondent's Residence Was Reasonable Because Officers Had Obtained His Wife's Consent

After explaining in *Matlock* that officers may effect a search based upon the consent of a third party who "possesse[s] common authority over or other sufficient relationship to the premises," 415 U.S. at 171, the Court clarified that the requisite "common authority" exists when the occupants "generally hav[e] joint access or control for most purposes," *id.* at 171 n.7. The trial court in this case found that, although respondent's wife had only recently returned to the marital residence after having left for a period of time, she "was still in possession of common authority to grant consent for police to search the marital home." J.A. 23. The Georgia Supreme Court likewise concluded that it was "faced with

[9] In *Matlock*, for example, the officers placed the defendant in a parked squad car upon his arrest and then went to his home to seek the consent of his co-occupant. In *Rodriguez*, the defendant was known to be asleep within the apartment at the time of the officers' entry.

a situation in which two persons have equal use and control of the premises to be searched." Pet. App. 1.

Accordingly, this case does not involve circumstances in which two occupants have differing degrees of authority over the residence. See 4 LaFave, *supra*, § 8.5. Nor has there been any suggestion that the bedroom in which the evidence was found was a particular area of the house over which respondent had greater authority. Rather, the Georgia Supreme Court determined that the search was invalid under the Fourth Amendment solely on the basis that respondent's presence on the premises divested his wife of authority to give an effective consent to search. That holding was incorrect.[10]

[10] Respondent suggested in his Brief in Opposition (at 4) that the Georgia Supreme Court based its decision on the Georgia Constitution. That is incorrect. The court based its holding on an interpretation of this Court's decision in *Matlock*, which turned exclusively on the Fourth Amendment. See Pet. App. 2-3. The court made clear its reliance on the Fourth Amendment when it stated at the conclusion of its opinion that a resolution contrary to the one it reached would "exalt[] expediency over an individual's Fourth Amendment guaranties." *Id.* at 3 (quoting *Leach*, 782 P.2d at 1040). In any event, the court's opinion contains no plain statement that it rests on state law. See *Rodriguez*, 497 U.S. at 182 (discussing *Michigan* v. *Long*, 463 U.S. 1032 (1983)).

CONCLUSION

The judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted.

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NO. 04-1067

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF GEORGIA,

Petitioner,

vs.

SCOTT FITZ RANDOLPH,

Respondent.

On Petition For A Writ of Certiorari To
The Georgia Supreme Court

BRIEF OF COLORADO, ALABAMA, DELAWARE, HAWAII, ILLINOIS, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN W. SUTHERS
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QUESTION PRESENTED

Whether a third party may give law enforcement valid consent to search premises shared with another when the other occupant is present and expressly objects to the search.

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INTERESTS OF AMICI CURIAE

The Amici States' interest arises from the fact that this case implicates a constitutionally permissible and wholly legitimate aspect of effective police activity: consent searches, specifically a third party's ability to provide consent to search. In *Georgia v. Randolph*, 604 S.E.2d 835 (Ga. 2004), the Georgia Supreme Court determined that a co-occupant cannot give law enforcement valid consent to search where the other occupant is present and objects to the search. This decision misinterprets the previous decisions of this Court and undermines the strong public policy in favor of consent searches.

STATEMENT OF THE CASE AND FACTS

On July 6, 2001, the respondent's wife reported a domestic dispute, and the police responded. The respondent's wife indicated that the respondent had taken their son. She also accused the respondent of using cocaine. When the respondent returned home without their son, he stated that he had taken the child to a neighbor's house because he was afraid his wife was going the leave the country with their son. Sergeant Brett Murray then accompanied the respondent's wife to retrieve the child.

After they returned home, the respondent's wife renewed her allegations regarding the respondent's cocaine use and told officers that there were drugs in the home.

Sergeant Murray confronted the respondent about his wife's allegations and asked for consent to search the home. The respondent said "no." Sergeant Murray then asked the respondent's wife for her consent to search, and she not only agreed but led Sergeant Murray to an upstairs bedroom where he observed a piece of cut straw covered with white

residue. Sergeant Murray left to obtain an evidence bag from his car, and when he returned, the respondent's wife informed him that she was withdrawing her consent to search the house. Sergeant Murray obtained a search warrant, and during the ensuing search, seized numerous drug-related items.

The respondent was charged with possession of cocaine, and he subsequently moved to suppress the drugs, claiming that the search of his home over his express objection violated his Fourth Amendment rights. The trial court denied the motion. The Georgia Court of Appeals granted the respondent's application for an interlocutory appeal and reversed the trial court's ruling. *See Randolph v. State*, 590 S.E.2d 834 (Ga. App. 2003). The Georgia Supreme Court then granted the State's petition for a writ of certiorari to decide whether a third party may give valid consent to search common areas of a home shared by another occupant who is present and objects to the search. The Georgia Supreme Court affirmed the judgment of the court of appeals:

> Inasmuch as we are faced with a situation in which two persons have equal use and control of the premises to be searched, we conclude the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search.

Randolph, 604 S.E.2d at 836.

SUMMARY OF THE ARGUMENT

The Georgia Supreme Court held that consent to search given by a third party with common authority is not valid to permit a warrantless search in the face of the express refusal of another occupant who is physically present at the scene. *Randolph*, 604 S.E.2d at 836. The holding of the Georgia Supreme Court is based on a misunderstanding of the facts and holding of *United States v. Matlock*, 415 U.S. 164 (1974), and fails to consider both the legitimacy and value of consent searches in the investigative process as well as the need to encourage people to report crime.

ARGUMENT

I. Consent To Conduct A Warrantless Search Of A Residence Given By A Third Party With Common Authority Is Valid Even In The Face Of A Co-Occupant Who Is Physically Present At The Scene And Refuses To Consent To A Search.

The question in this case is whether a third party may give law enforcement valid consent to search premises shared with another even though the other occupant is present and expressly objects to the search. Where a third party has common authority over the premises to be searched, her consent is valid even when her co-occupant is present and objects.

The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures by law enforcement. U.S. Const. amend. IV. However, "a warrantless entry and search by law

enforcement officers does not violate the Fourth Amendment's proscription of 'unreasonable searches and seizures' if the officers have obtained the consent of a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990) (citing *Matlock*, 415 U.S. at 171).

In *Matlock*, this Court held that consent is valid when "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." 415 U.S. at 171. This Court explained:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinement, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that **it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.**

415 U.S. at 171 n.7 (citations omitted) (emphasis added). While the facts presented in *Matlock*, as discussed below, differ slightly from those in the present case, the reasoning of *Matlock* is equally relevant and should be applied to the facts presented here.

Police officers arrested Matlock in his front yard, and although the officers knew that Matlock lived in the house, they did not ask him which bedroom was his or whether he would consent to a search of the home. Instead, the police requested consent to search the home from Matlock's housemate, and she agreed. While searching the bedroom Matlock shared with his housemate, the officers discovered and seized a large amount of cash. This Court upheld the search, reasoning that the police obtained voluntary consent from a person with common authority:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Matlock, 415 U.S. at 171.

The Georgia Supreme Court erred in construing *Matlock* as invalidating third-party consent where a co-occupant is present and objects to the search. *Matlock* did not turn on the defendant's presence or absence, or his consent or nonconsent, but rather his assumption of the risk and the third party's right to consent.

The rationale of *Matlock* is that a co-occupant assumes the risk that another occupant may expose common areas to a search. Under such circumstances "[t]here is no reasonable expectation of privacy to be protected." *United States v. Sumlin*, 567 F.2d 684, 688 (6th Cir. 1977). The additional fact that the respondent in this case expressly

refused to consent in no way lessened the risk that his wife would consent. *See J.L. Foti Constr. Co. v. Donovan*, 786 F.2d 714, 716-17 (6th Cir. 1986) (citing *Sumlin*, 567 F.2d at 688); *see also United States v. Shelton*, 337 F.3d 529, 537 (5th Cir. 2003) ("[T]he Fourth Amendment does not protect 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'") (quoting *Hoffa v. United States*, 385 U.S. 293, 302 (1966)). An occupant who shares common authority with another understands that his "privacy is not absolute, but contingent in large measure on the decisions of another." *United States v. Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990); *see also United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995) (Occupant's reasonable expectations of privacy "must include the risk that a co-occupant will allow someone to enter, even if the defendant does not approve of the entry."). Thus, while *Matlock* did not specifically address the existence of an objecting co-occupant, the assumption of the risk rationale is equally applicable to these facts.

Nevertheless, some courts have interpreted *Matlock* as precluding consent searches where the co-occupant is present and objects to the search, holding that *Matlock* concerned an absent co-occupant. *See Randolph*, 604 S.E.2d at 837; *State v. Leach*, 782 P.2d 1035 (Wash. 1989); *Silva v. State*, 344 So.2d 559 (Fla. 1977). The case at bar presents this Court with the opportunity to reject these interpretations and to clarify that *Matlock's* reasoning applies where a third party with common authority voluntarily consents to a search even though another occupant is present and objects to the search.

A third party's ability to consent in her own right is based on her relationship with the property and the fact that the remaining occupants have assumed the risk "that one of their number might permit the common areas to be

searched." *Matlock*, 415 U.S. at 171 n.7. The rationale behind permitting searches based upon third-party consent was first articulated by this Court in *Frazier v. Cupp*, 394 U.S. 731 (1969), wherein this Court stated that by allowing another person access to a particular place or item, the defendant was assuming the risk that the third party would allow others to search it:

> Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside.

Id. at 740. Thus, an occupant's decision to permit another "joint access [to] or control [over the property] for most purposes" limits that occupant's reasonable expectation of privacy and to that extent limits his Fourth Amendment protections. *Matlock*, 415 U.S. at 171 n.7; *see also* James B. White, *The Fourth Amendment as a Way of Talking about People: A Study of Robinson and Matlock*, 1974 S.Ct.Rev. 165, 223-24 (Once a defendant has given a third party the unrestricted right to share in the use and control of certain property, he has, "as a matter of constitutional law, placed this aspect of his privacy irrevocably in the hands of the joint occupant...."), *quoted in* 4 Wayne R. LaFave, *Search and Seizure*, § 8.3(c) at 153 (4th ed. 2004).

The Georgia Supreme Court cited *Matlock* as holding that "the consent of one who possesses common authority

over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Randolph*, 604 S.E.2d at 837 (quoting *Matlock*, 415 U.S. at 170). But both the structure of the *Matlock* opinion and the facts presented in *Matlock* indicate its holding is much broader. Perhaps most instructive is the fact that the defendant in *Matlock* was not absent at all, but was present in the front yard of his home. Moreover, the quoted language cited by the Georgia Supreme Court comes as part of this Court's discussion of how prior caselaw contributed to its reasoning. Concluding the discussion of these cases, this Court stated its holding, which goes beyond the very limited reading adopted by the Georgia Supreme Court:

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Matlock, 415 U.S. at 170. This unequivocal holding is not qualified by the Court's earlier reference to the "absent, nonconsenting person." *See United States v. Rith*, 164 F.3d 1323, 1328 (10th Cir. 1999); *see also* Charles H. Whitebread & Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* § 12.04, at 265-66 (3rd ed. 1993) (*Matlock* stands for the proposition that "if the state can establish that the third party shares an area with another more or less equally, that party's consent authorizes a search of the entire area regardless of the other person's proximity to, agreement with, or relationship with the third party.").

In addition to the fact that the legal analysis supports the validity of third-party consent, such consent should be considered valid for policy reasons as well. This Court has long recognized the validity of third-party consent. *See Frazier*, 394 U.S. at 740; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971) (where defendant's wife surrendered to police guns and clothing belonging to her husband, this Court found nothing impermissible in the admission of that evidence since the wife had not been coerced); *Bumper v. North Carolina*, 391 U.S. 543, 548 n.11 (1968) (although consent was not voluntary, the Court at least intimated that if the third party had voluntarily acquiesced to a search of the premises, the resulting search would have been binding upon defendant).

Consent searches were later accepted as "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamante*, 412 U.S. 218, 228 (1973). Consent searches serve a legitimate and valuable purpose and are part of the standard investigative technique of law enforcement agencies: "In situations where police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227. Additionally, "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Id.* at 243. Thus, third-party consent furthers both society's interest in controlling crime and individuals' interest in aiding law enforcement.

As a policy matter, occupants should not be prohibited from acting as cooperative citizens. By

recognizing that a third party has the right to permit inspection in her own right, the *Matlock* court intended to leave the third party with the ability to act in her own interests or the interests of the public. *See Coolidge*, 403 U.S. at 488 ("[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."). Indeed, a third party should be allowed to act in her own interest to allow police to seize illegal drugs that she might later be charged with possessing. *See* LaFave, *supra*, § 8.3(d) at 161. A third party may also desire to rid her home of drugs or other illegal items because of the dangers they present. *See People v. Cosme*, 397 N.E.2d 1319 (N.Y. 1979) (defendant's fiancée summoned police to home she shared with defendant because defendant was storing drugs in closet also used by her; court held her consent was effective even though defendant was present and objected to the search).

Despite the strong public policy in favor of third-party consent, a co-occupant's right to privacy is not completely at the mercy of those with whom he lives. In addition to proving that consent was voluntarily given, the prosecution must show that the third party had common authority over the premises to be searched.[1] *See Matlock*, 415 U.S. at 171; *compare Stoner v. California*, 376 U.S. 483 (1964) (night hotel clerk could not validly consent to search of customer's room); *Chapman v. United States*, 365 U.S.

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[1] If the third party lacks common authority to consent to the search, the evidence will not be excluded if the prosecution can establish that "the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Rodriguez*, 497 U.S. at 188 (internal quotations and citations omitted).

610 (1961) (landlord could not validly consent to the search of a house he had rented to another).[2] Moreover, where an occupant has taken sufficient, affirmative steps to protect his personal effects, he may have a protected expectation of privacy based on the rationale that he has not assumed the risk. *See United States v. Block*, 590 F.2d 535, 541 (4th Cir. 1978) (holding that while a mother could consent to a search of her son's room, she did not have authority to consent to a search of a locked footlocker within the room); *see also Morning*, 64 F.3d at 536 ("A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence.").

However, it is not sufficient for a defendant to merely claim exclusive control without establishing that he has sole access to the place searched. *See* LaFave, *supra*, § 8.3(f) at 168-69. The legitimate and valued practice of making consent searches should not be unduly burdened by complex, individual living arrangements:

> The police might be deterred from employing consent searches altogether if they were required to ascertain the ownership or possession or custody of every article or space on the premises searched. The metaphysical subtleties would be endless and consent searches would be lost from the law enforcement arsenal.

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[2] While the results reached in *Stoner* and *Chapman* are consistent with the *Matlock* opinion, those cases were analyzed under a now-rejected, property-based understanding of the Fourth Amendment. *See Matlock*, 415 U.S. at 171 n.7.

United States v. Robinson, 479 F.2d 300, 303 (7th Cir. 1973) (citing *Frazier*, 394 U.S. at 740).

Where, as here, the occupant fails to take any steps to protect his privacy interest in his personal effects, third-party consent to search is valid even in the face of a present, objecting co-occupant.

CONCLUSION

For the foregoing reasons, the judgment of the Georgia Supreme Court should be reversed.

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State of Georgia,
Petitioner,

v.

Scott Fitz Randolph,
Respondent.

On Writ of Certiorari
to the Supreme Court of Georgia

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QUESTION PRESENTED

Is a warrantless search of the home valid on the basis of the consent of one occupant over the express objection of another?

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No. 04-1067

IN THE

Supreme Court of the United States

State of Georgia,
Petitioner,

v.

Scott Fitz Randolph,
Respondent.

On Writ of Certiorari
to the Supreme Court of Georgia

BRIEF FOR THE RESPONDENT

Respondent Scott Fitz Randolph respectfully requests that this Court affirm the judgment of the Supreme Court of Georgia in this case.

STATEMENT OF THE CASE

1. On July 6, 2001, police responded to a report of a domestic dispute between respondent Scott Fitz Randolph and his estranged wife. The couple had separated several months before, and she had left with the couple's son, as well as most of her belongings, to stay with her family in Canada. On July 4, 2001 – approximately thirty-six hours before the police were called to the house – she arrived at the house to collect

her remaining belongings and return to Canada. Oct. 3, 2002 Suppression Transcript (Suppress. Tr.) 23-24.

On the morning of July 6, respondent had taken the couple's son to a neighbor's house in an attempt to prevent his estranged wife from taking their son out of the country again or, more generally, traveling with him while she was under the influence of drugs and alcohol. Suppress. Tr. 6, 24, 27.

Mrs. Randolph responded by calling the police. Suppress. Tr. 28. When police arrived, they faced dueling allegations. Mrs. Randolph contended that respondent had been using cocaine. He denied that accusation, contending instead that *she* had been using cocaine and had also been drinking heavily. The officer later testified that "there was a lot of animosity going on. This was a marriage about to break apart." *Id.* 15-16.

The police requested permission from respondent, who is an attorney, to search the residence without a warrant. He flatly denied them consent. Suppress. Tr. 8, 29. He also contacted the owners of the house – his parents, to whom he personally paid rent – who advised the police by phone that they also did not consent to a search of the premises. *Id.* 30, 38.

Notwithstanding that consent had been expressly denied by both respondent and the owners of the house, the police nonetheless secured consent from respondent's wife. She then took the officers upstairs, to a room that she identified as respondent's personal bedroom. Suppress. Tr. 8. There, the police found a "piece of cut straw" and what appeared to be cocaine. *Id.* 9.

Officers then contacted the district attorney, who advised them to secure a warrant before continuing the search. Suppress. Tr. 9. Mrs. Randolph subsequently withdrew her consent to the search as well. *Ibid.*

The officers collected the materials they had seen, arrested both respondent and Mrs. Randolph, and took them

to the police station. They then obtained a search warrant on the basis of the evidence found in the home. The ensuing search uncovered various evidence of drug use. Suppress. Tr. 10-11.

2. The State indicted respondent for possession of cocaine. Respondent moved to suppress the evidence seized from the home on the ground that it was the fruit of an unlawful search. The trial court denied the motion in a one-page order, summarily ruling that Mrs. Randolph "was still in possession of common authority to grant consent for police to search the marital home," with the asserted consequence that she could admit the police over respondent's objection. J.A. 23.

3. On respondent's interlocutory appeal, the Georgia Court of Appeals reversed. Pet. App. 7a-47a. It acknowledged that this Court had held in *United States* v. *Matlock*, 415 U.S. 164 (1974), that "'the consent of one who possesses common authority over premises or effects is valid as against the absent nonconsenting person with whom that authority is shared,'" because "it is reasonable to expect that a co-habitant with the authority to give such consent might, in fact, exercise that authority." Pet. App. 8a (quoting *Matlock*, 415 U.S. at 170). It saw this case as quite different: when an occupant does not cede control of the premises to another, but rather is physically present and objects to the search, "it is reasonable for [the] occupant to believe his wishes will be honored." *Id.* 9a. The court reasoned as well that extending *Matlock* to cases in which an occupant expressly objects would draw the police into marital disputes, *id.* 11a, and would unreasonably allow the police to ask for consent from numerous occupants successively until one granted permission to search, *id.* 13a.

4. The Supreme Court of Georgia affirmed. Pet. App. 1a-6a. Joining the Florida, Minnesota, and Washington Supreme Courts, the court held that a contemporaneous objection to a warrantless search by one occupant cannot be

overridden by the consent of another. *Id.* 3a (citing *Silva* v. *State*, 344 So. 2d 559, 562 (Fla. 1977); *In the Matter & Welfare of D.A.G.*, 484 N.W.2d 787, 789 (Minn. 1992); *State* v. *Leach*, 782 P.2d 1035, 1040 (Wash. 1989)).[1] The court agreed with the view of those courts and a leading commentator that it is not reasonable to permit one occupant to override the Fourth Amendment rights of another.

5. This Court granted the State's petition for a writ of certiorari. 125 S. Ct. 1840 (2005).

SUMMARY OF THE ARGUMENT

I. The State cannot justify the extension of this Court's third party consent precedents to permit a search over the objection of an occupant of the premises.

A. This Court has recognized a "basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Groh* v. *Ramirez*, 540 U.S. 551, 564 (2004). The State contends that the search in this case falls within the "consent" exception to the strong prohibition against warrantless searches even though respondent strenuously objected to the search. That argument must be rejected because respondent did not, in this case, "consent" to the search in any ordinary sense of the term and because there is no cause for expanding the "consent" exception to include cases where one resident objects and another consents.

This Court has sustained consent searches because they do not impinge on personal privacy (the individual having waived his right to exclude the police), and because they serve important law enforcement interests when police are unable to secure a warrant. See, *e.g.*, *Zap* v. *United States*, 328 U.S. 624, 628 (1946). The same considerations explain

[1] Although not cited below, the New York courts agree. See *People* v. *Miller*, 572 N.Y.S.2d 149 (Ct. App. 1991) (reaffirming *People* v. *Mortimer*, 46 A.D.2d 275, 277-78 (Ct. App. 1974)).

this Court's decisions approving searches based on "third party consent" when an individual leaves his property under the control of another person. In that scenario, the individual "assumes the risk" that the person to whom control over the property has been relinquished will admit the police. Prohibiting third party consent would also place on the police the extraordinary burden of locating every person with a privacy interest in property before conducting a consent search.

This Court has never held that a search could be sustained on the basis of "consent" in the very different circumstance in which an occupant makes a clear and contemporaneous objection. In that scenario, the strong presumption of unconstitutionality is not overcome, because the search dramatically intrudes on personal privacy, gives rise to extraordinary personal insecurity, and advances no legitimate law enforcement interest.

B. The State's proposed rule would be devastating to personal privacy. The protections of the Fourth Amendment are at their apex in the home. The State's position, however, would disparage the privacy rights of every person who lives with others – the overwhelming majority of American society today, and more than ninety-eight percent of the population at the time of the Constitution's framing. Without any justification, the State leaps from the fact that individuals choose to live their intimate lives with spouses, children, or social guests to the specious conclusion that persons who share some aspects of their private lives with others are somehow indifferent as to whether the government can conduct wholesale, intrusive searches of their homes. Under the State's approach, the right to privacy is in tension with the very life activities that privacy within the home is intended to protect. Properly understood, the right to live a social life coexists comfortably with the right to exclude the government from one's most private spaces.

When, as in this case, an individual is physically present and lodges a direct and contemporaneous objection to a warrantless search, it cannot seriously be contended that he has relinquished control over the premises and "assumed the risk" that someone else would authorize a warrantless search. The State's approach ignores the best evidence of an individual's decision whether to relinquish his right to exclude the government – namely, his express and contemporaneous statement that he wishes to assert his Fourth Amendment rights.

C. The State's rule should also be rejected because it would create a pervasive sense of personal insecurity. The State contends that every person who lives with others is powerless to ensure privacy in his or her home. Rather, privacy rights on its view are entirely contingent on the acquiescence of every other person in the residence. The police could secure permission to search, over the objection of a resident, from any "occupant," a category of persons that lower courts have held to include even minor children. The police could seek permission from every resident seriatim until a single person – whether out of spite, ignorance of the objections of others, or fear that any objection would be meaningless – overrode the objections of all the others. Such a "right" to privacy is no right at all.

D. The State has not argued, much less shown, that an exception to the ordinary warrant requirement is justified by any "special needs, beyond the normal need for law enforcement, [which] make the warrant and probable-cause requirement impracticable." *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987). Indeed, the fact that a co-occupant who *does* wish to reveal information to the police is free to do so negates the State's claim that warrantless searches in this context serve a legitimate law enforcement function. First, the police can use any information provided by a consenting co-occupant as the basis for a warrant application. Crucially, however, that information will be assessed by a neutral magistrate to determine whether there is probable cause

sufficient to override an objecting occupant's assertion of his right to privacy and will result in issuance of a warrant that carefully balances the right to search with the occupant's interest in privacy. Second, the co-occupant is free to remove contraband from the residence and to give it to police, thereby providing them with both evidence itself and an additional basis for seeking a warrant. Either approach accomplishes legitimate law enforcement interests while better protecting the personal privacy that is seriously undermined by a generalized search of the premises.

II. The State contends that its contrary rule is nonetheless compelled by this Court's "third party consent" rulings. That argument lacks merit.

A. The State rests its position on this Court's statements that occupants may validly grant third party consent "in their own right" so long as they have "common authority" over the premises. *Matlock*, 415 U.S. at 171 & n.7. Those statements did not purport to decide the question presented here, as this Court has never addressed the question whether a search could be sustained on the basis of "consent" notwithstanding the clear objection of a person with a privacy interest in the premises.

Neither of the cited statements from *Matlock* in any event is contrary to respondent's position. When control over the premises has been relinquished, the occupant who grants consent does so "in his own right." Persons with "common authority" are simply those who presumptively exercise control over the premises. The relevant point is that the presumption may be overcome by an objection. The very fact that the authority is "common" – so that no occupant has superior rights over the other – refutes the State's suggestion that this Court's precedents recognize an inviolate right of each occupant to admit the police, notwithstanding the objection of the others.

B. The State notably fails to identify any *source* for the supposed right of each occupant to override the others'

objection to a search by the police. Despite the arguments advanced by the Solicitor General, the common law of property provides no basis for the State's position. Even assuming that an occupant would have had the right at common law to admit a guest over his co-occupant's objection (and the Solicitor General fails to establish that such a right exists), a long line of precedents holds that Fourth Amendment rights are not dependent on whether the police could be admitted or excluded under the law of property. Such an argument in any event would not justify the State's position, under which individuals who have "common authority" over the premises but who *do not* have property rights (*e.g.*, children living at home) nonetheless would be able to override the Fourth Amendment rights of occupants who *do* (*e.g.*, their parents).

C. The State's central argument is that the source of the power of persons with "common authority" over the premises to admit the police is the fact that their co-occupants have a "reduced expectation of privacy" as a necessary consequence of living with others. This theory seems to rest on supposed social expectations about the relationship between co-occupants in shared living spaces. The State and its *amici* advance two variations on this theory, neither of which is persuasive or consistent with this Court's precedents.

1. The State's principal contention – or at least its assumption – is that occupants anticipate that their co-occupants will invite guests into the residence over their objection. That position cannot be reconciled with this Court's decision in *Minnesota* v. *Carter*, 525 U.S. 83 (1998), which held that even individuals who *lack* property rights (in that case, an overnight guest) nonetheless have a recognized expectation of privacy because of the commonly shared understanding that a property-owning host would not permit entry – and certainly would not permit the search of a guest's possessions – if the guest objected. It follows *a fortiori* that there is an understanding that an occupant would not admit into the home a third party over the objection of his co-

occupant. In any event, understandings regarding the admission of *social* guests do not determine individual rights with regard to keeping out the *government*, which is the subject of the Fourth Amendment.

2. Nor does the undisputed ability of other occupants to reveal to third parties information gleaned from conversations bear on the question whether those occupants can permit the sweeping intrusion into an individual's privacy that a warrantless search effects. To be sure, this Court has held that when an individual reveals information to a third party, he assumes the risk that that third party may provide that information to the government without a warrant. But those cases differ from this one in two critical ways. First, they involve the disclosure of information. This case, by contrast, involves wholesale government intrusion into a space – the home – that contains a significant amount of material that the individual being searched has *not* revealed to anyone. Second, those cases involve the privacy that attaches to information, as opposed to the home itself, a place that has special importance under the Fourth Amendment.

The judgment of the Supreme Court of Georgia that the warrantless search in this case violated the Fourth Amendment accordingly should be affirmed.

ARGUMENT

I. The Strong Presumption That a Warrantless Search of a Home Is Unconstitutional Cannot Be Overcome When an Occupant Objects to the Search.

The police in this case searched respondent's home – the principal space protected by the Fourth Amendment, see, *e.g.*, *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) – without his consent or a warrant. "Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989). Those

"well-defined circumstances" include cases of "consent or exigency." *Groh* v. *Ramirez*, 540 U.S. 551, 564 (2004). But in all other circumstances, this Court has permitted warrantless searches of a home only when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable" and an exception is justified in light of the "balance [of] the governmental and privacy interests." *Skinner*, 489 U.S. at 619.

The State argues that this case falls within the limited exception to the warrant requirement for searches based on the "consent" of an occupant. Its position is that every occupant (*i.e.*, not merely a property owner or leaseholder) has an inviolate right to consent to a search notwithstanding the objection of all of the other occupants (including the property owners). In fact, the State's argument would require a dramatic expansion of the "consent" exception, which this Court has never extended to a case in which an occupant has clearly and contemporaneously objected to the search.

A. This Court Has Approved Searches on the Basis of "Third Party Consent" Only When the Individual Has Voluntarily Relinquished His Right to Exclude the Police.

"Consent" searches are "reasonable," this Court has held, because they impinge on personal privacy only slightly (if at all) while simultaneously furthering a substantial law enforcement interest. No cognizable intrusion on privacy rights occurs in a traditional consent case, given the individual's "voluntary relinquishment" of his right to exclude the police. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229 (1973). Consent searches are also a valuable law enforcement tool when officers are unable to secure a warrant. See *id.* at 227.

The same calculus explains this Court's decisions finding searches valid on the basis of "third party consent." Because the Fourth Amendment protects a personal right to privacy,

whether the individual has retained control over the property to be searched or instead has given up control to someone else is highly relevant to the Amendment's application. It is settled, for example, that the right to privacy does not apply to abandoned property. *E.g.*, *California* v. *Greenwood*, 486 U.S. 35 (1988) (trash left outside for pickup). The relinquishment of privacy interests is complete in that circumstance, and the property can be searched and seized without a warrant and without consent. *Ibid.*

In other cases, the individual with a privacy interest only temporarily relinquishes control by leaving the property for a time under the supervision of another. In this circumstance, the Fourth Amendment continues to apply. It has never been suggested, for example, that the police can barge through the front door of a home whenever it happens to be watched by a housesitter.

But the temporary relinquishment of control can nonetheless have Fourth Amendment consequences. This Court has concluded that the person in whose hands the property has been entrusted has the power to consent to a search. The Court has twice approved such searches – once when consent was given by a person to whom the defendant had entrusted the property being searched (*Frazier* v. *Cupp*, 394 U.S. 731 (1969)) and once when one of the occupants of a house consented and none of the others was present or objected (*United States* v. *Matlock*, 415 U.S. 164 (1974)).[2] In these circumstances, the defendant had no complaint that his privacy had been intruded upon. By voluntarily relinquishing *control* over the property, he "assume[d] the risk" that the person to whom the property had been entrusted would admit the police. *Frazier*, 394 U.S. at 740; *Matlock*, 415 U.S. at 171 n.7. While it was possible that the absent party would

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[2] In a third case, *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990), the Court held that the Fourth Amendment was not violated if officers made a reasonable mistake about the person's status as an occupant.

have objected had he been there, this Court's decisions reflect the fact that countervailing law enforcement interests required a bright-line, objective rule. Otherwise consent searches would be unadministrable, as it would be impractical to require police to identify, locate, and obtain permission from every occupant of a residence before conducting a warrantless search.

When persons with a privacy interest in the place or thing to be searched either are absent or are present and do not object to the search, the occupant who consents does so with the right to control entry onto the premises. Consent is thus granted by the present occupant "in his own right." *Matlock*, 415 U.S. at 171 n.7. The police are moreover entitled to operate under a bright-line rule that, absent a contemporaneous objection, each occupant with control over the premises has the authority to consent to a search on behalf of those who are absent. "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001). If a resident consents in that circumstance, the ensuing search is "reasonable" for purposes of the Fourth Amendment. *Rodriguez*, 497 U.S. at 187.

But this Court has never held – indeed, has never suggested – that the police could search a home over the clear and contemporaneous objection of one of the residents simply because a consenting resident had common authority over the property. Indeed, this Court's cases clearly reject that proposition. For example, the Court's foundational third party consent cases held that hotel employees could not validly consent to the search of guests' rooms, even though the employees had a right to access the room. See *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel clerk); *United States* v. *Jeffers*, 342 U.S. 48 (1951) (assistant manager); *Lustig* v.

United States, 338 U.S. 74 (1949) (manager). Although the hotel owned the room and a guest had granted "implied or express permission" to enter the room "to such persons as maids, janitors or repairmen in the performance of their duties," the Court reasoned that the police in these cases could not reasonably have believed that the guests had relinquished to the hotel the power to admit third parties in their absence. *Jeffers*, 342 U.S. at 51. The Court accordingly held that the searches violated the Fourth Amendment:

> It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.

Stoner, 376 U.S. at 489. The Court recognized that permitting third parties to control whether police could enter the premises would make the right to privacy essentially meaningless. "That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel." *Id.* at 490. The appropriate course, the Court explained, was instead for the police to seek a warrant and secure the premises in the interim. *Jeffers*, 342 U.S. at 52.

In *Chapman* v. *United States*, 365 U.S. 610 (1961), the Court again held that a supposed third party consent was invalid. This time, the case involved the search of a rented home after the landlord consented to the entry. The search discovered illegal moonshine manufactured by the tenants. This Court held that the landlord could not validly authorize the search because the tenants had not granted him the requisite control over the premises. *Id.* at 616-17. The Court

reiterated that a broad rule rendering the protection from warrantless searches contingent on the actions of third parties would render the Fourth Amendment ineffective. "[T]o uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" *Ibid.* (alterations in original) (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)).

Accordingly, common authority over a premises is not, in itself, sufficient to confer a right to consent to the search of a home where others also have privacy interests at stake. In the "third party consent" cases, common authority was combined with the relinquishment of control over the premises by the absent party. Thus, *Matlock* explained that the Court's precedent held that "the consent of one who posseses common authority over premises" is "valid" only "as against the *absent*, nonconsenting person with whom that authority is shared." 415 U.S. at 170 (emphasis added). It is only in these limited circumstances that it "is reasonable to recognize" that "the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* 171 n.7.

As respondent now demonstrates, the State's attempt to extend this Court's third party consent precedents to the circumstance in which one occupant overrides the objections of the others should be rejected. The State's proposed rule would authorize an extraordinary intrusion into personal privacy. It would create a pervasive sense of insecurity, as every person who lives with others would fear that he was powerless to ensure his privacy in the home. And it would not advance any substantial law enforcement interest.

B. The State's Rule Would Approve an Extraordinary Intrusion into the Core Privacy in the Home That Is the Principal Concern of the Fourth Amendment.

1. This case involves a search of a private home. Despite respondent's express objection, officers intruded into his residence, including his bedroom. The home represents the single most important spatial zone of personal privacy protected by the Fourth Amendment. This Court explained the historical and textual foundation for the unique protection afforded to individual privacy in the home in *Wilson* v. *Layne*:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B.). * * * The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home: "The right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., Amdt. IV (emphasis added).

526 U.S. 603, 609-10 (1999).

This Court's modern precedents unhesitatingly adhere to the original meaning of the Fourth Amendment:

> The axiom that a man's home is his castle, or the statement attributed to Pitt that the King cannot enter and all his force dares not cross the threshold, has acquired over time a power and an independent significance justifying a more general assurance of

> personal security in one's home, an assurance which has become part of our constitutional tradition.

Minnesota v. *Carter*, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring). "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed * * *." *United States* v. *U.S. District Court*, 407 U.S. 297, 313 (1972). "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)). See also *Payton* v. *New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house.").[3]

This Court has vigorously enforced the personal right to privacy in the home, recognizing that it allows each of us to define our own personal relationships and order our lives apart from the government. "The Fourth Amendment protects 'the right of the people to be secure in their * * * houses,' and it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Carter*, 525 U.S. at 99 (Kennedy, J., concurring). "This Court has characterized that right as 'basic to a free society.' And over the years the Court consistently has been

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[3] Because the home is a specially protected place under the Fourth Amendment, this Court has held, among other things, that officers must first secure an arrest warrant to arrest a suspect in his own home (*Payton*, 445 U.S. 573); must have a search warrant to make an arrest in a third party's home (*Steagald* v. *United States*, 451 U.S. 204 (1981)); may not execute an arrest warrant in the home accompanied by the media (*Wilson*, 526 U.S. 603); and must have a warrant to employ technology not in general public use to discern information about the interior of the premises (*Kyllo*, 533 U.S. 27) and to monitor indiscriminately an electronic device that signals its presence in the home (*United States* v. *Karo*, 468 U.S. 705 (1984)).

most protective of the privacy of the dwelling." *Wyman* v. *James*, 400 U.S. 309, 316 (1971) (quoting *Wolf* v. *Colorado*, 338 U.S. 25, 27 (1949) and *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967)). "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). See also *Schneckloth*, 412 U.S. at 242 ("The guarantees of the Fourth Amendment stand 'as a protection of * * * values reflecting the concern of our society for the right of each individual to be let alone.'" (quoting *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 416 (1966)).

Living with others necessarily imposes a range of compromises on an individual, ranging from authority over the television remote control to noise levels, decor, and the choice of friends. But the fact that virtually all individuals allow others into their homes, and that most individuals in fact share their homes permanently with family members, hardly undercuts their expectations of privacy. At the time of the framing, for example, 98.6% of all households had more than one member, and the average household size varied from roughly six to eleven people. Robert V. Wells, THE POPULATION OF THE BRITISH COLONIES IN AMERICA BEFORE 1776, at 87 tbl. III-7 & 105 tbl. III-16 (1975) (reporting data for Massachusetts and Rhode Island).

Indeed, the intimate associational activities that occur in the home underlie the special constitutional protection accorded to the home. See *Minnesota* v. *Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("The Fourth Amendment protects 'the right of the people to be secure in their * * * houses,' and it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people."). The prototypical "marital bedroom," after all, is by definition a shared space. Cf. *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965) (decrying the possibility of searches that would intrude on the "sacred

precincts of marital bedrooms"); *Lawrence* v. *Texas*, 539 U.S. 558, 564-65 (2003) (extending the protected interest beyond that of married couples). In short, when this Court stated that "[t]he guarantees of the Fourth Amendment stand 'as a protection of * * * values reflecting the concern of our society for the right of each individual to be let alone,'" *Schneckloth*, 412 U.S. at 242 (quoting *Tehan*, 382 U.S. at 416), it was not suggesting that for individuals to be *left* alone, they were required to *be* alone.[4]

2. The State's argument in this Court would permit the government to intrude directly into this core area of personal privacy without making a showing of probable cause and securing a warrant as required by the Constitution. As discussed in Part I-A, *supra*, in this Court's previous cases involving first-person and third-party consent, the government did not intrude on any cognizable privacy interests because the conduct of the individual whose privacy was at stake effectively waived the right to exclude the government. He either granted consent himself or left the property under the control of another person (either by leaving the premises or by not objecting when present[5]), thereby "assum[ing] the risk" that the person in whom control had been vested would admit the police. In both instances, the individuals took steps that could reasonably be expected

[4] Cf. *Lo-Ji Sales* v. *New York*, 442 U.S. 319 (1979) (rejecting argument that adult bookstore had reduced expectation of privacy because customers visited the premises); *Stoner*, 376 U.S. at 489 (rejecting argument that hotel guest had reduced expectation of privacy because hotel employees entered the room).

[5] The courts of appeals have recognized in analogous contexts that the failure to state an objection represents assent to a request for permission to search. See *United States* v. *West*, 321 F.3d 649, 651 (CA7 2003); *United States* v. *Stapleton*, 10 F.3d 582, 584 (CA8 1993); see also *United States* v. *Meza-Gonzalez*, 394 F.3d 587, 592 (CA8 2005); *United States* v. *Patten*, 183 F.3d 1190, 1194-95 (CA10 1999).

to "forfeit their constitutional rights." *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991).[6]

Here, by contrast, the State takes the much more extreme position that *merely by living with others* – an activity which is constitutionally protected by the First, Fourth, and Fourteenth Amendments – an individual sacrifices his right to privacy. It thus forthrightly contends that a "reduced expectation of privacy simply grows out of sharing the premises with someone else." Br. 19. The United States makes the similarly sweeping claim that every person is exposed to the prospect that his core Fourth Amendment rights will be overridden, "unless he lives alone, or at least has a special and private space within the joint residence." Br. 15 (quoting *United States* v. *Morning*, 64 F.3d 531, 536 (CA9 1995), cert. denied, 516 U.S. 1152 (1996)).

The State cannot, and does not, dispute that when an occupant makes a contemporaneous objection to a search, he is asserting his right to privacy and is making clear to officers that he has not ceded to another person control over the residence. In that circumstance, it is absurd to suggest that the individual has waived his right to exclude the police and that the search can be deemed "reasonable" on that basis. As the court of appeals concluded, "when police are confronted with an unequivocal assertion of that co-occupant's Fourth Amendment right, such [a] presumption cannot stand." Pet. App. 12a. It is thus "inherently reasonable that police honor a present occupant's express objection to a search of his dwelling." *Id.* 10a. The United States itself concedes that "[t]he fact that an occupant expresses an objection to a search would matter if, in the absence of such an objection, it is

[6] See also, *e.g.*, *Zap* v. *United States*, 328 U.S. 624, 628 (1946) ("[W]hen petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.").

assumed that all occupants agree to [be] bound by a consenting party's action." Br. 24. In these circumstances, it manifestly was *not* "reasonable" for an "objectively reasonable officer" (*Muehler* v. *Mena*, 125 S. Ct. 1465, 1472 (2005) (Kennedy, J., concurring)) to conclude that respondent's wife "ha[d] the right to permit the inspection in [her] own right" (*Matlock*, 415 U.S. at 171 n.7).

For essentially the same reason, a resident who is present and has expressly objected to a search has not in any sense "assumed a risk" that his rights will be overridden. As the Georgia Supreme Court explained, quoting a leading commentator: "While one co-inhabitant may have assumed the risk that a second co-inhabitant will consent to a search of common areas in the absence of the first co-inhabitant, the risk assumed by joint occupancy goes no further – the risk 'is merely an inability to control access to the premises during one's absence.'" Pet. App. 2a-3a (quoting 3 LaFave, SEARCH & SEIZURE § 8.3(d), at 731 (3d ed. 1996)).

Stripped of any suggestion that respondent himself voluntarily relinquished his right to exclude the police, the State's position reduces to the claim that his wife had the power to waive his right to privacy. But the Fourth Amendment confers a "personal" right to privacy, not a right that attaches to a group or to a place. It has long been settled that the Amendment protects "the privacy of the individual, his right to be let alone." *Davis* v. *United States*, 328 U.S. 582, 587 (1946). Cf. *Minnesota* v. *Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) ("The people's protection against unreasonable search and seizure in their 'houses' was drawn from the English common-law maxim, 'A man's home is *his* castle.'"). It is precisely the fact that the "rights assured by the Fourth Amendment are personal rights" that underlies this Court's seminal holding in *Rakas* v. *Illinois* that individuals may not object to a search of an area in which they lack any expectation of privacy. 439 U.S. 128, 138 (1978) (quoting *Simmons* v. *United States*, 390 U.S. 377, 389 (1968)).

If "Fourth Amendment rights are personal rights that may not be *asserted* vicariously," *Rakas*, 439 U.S. at 133 (emphasis added), it necessarily follows that they may not be *waived* vicariously either. Yet, permitting the police to disregard an individual's objection to a warrantless search of his home based on the consent of a third party inescapably amounts to a waiver of the objector's personal Fourth Amendment rights. See *Stoner*, 376 U.S. at 489. As the court of appeals recognized, "the right involved is the right to be free from police intrusion, not the right to invite police into one's home. Thus, the issue is not Mrs. Randolph's right to consent to a search, but whether she may waive her husband's right to be free from the search. Given [respondent's] unequivocal assertion of that right, it seems disingenuous to conclude that he waived it." Pet. App. 12a-13a.[7]

C. The State's Proposed Rule Would Deprive Individuals of Any Ability to Protect Their Privacy in Their Homes and As a Result Would

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[7] The State asserts that this Court broadly rejected a "waiver" theory of consent searches in *Schneckloth*. Br. 12. The particular terminology – "waiver" versus "voluntary relinquishment" – makes no difference: the point is that individuals have a right to keep out the government that they give up in cases of genuine consent, but that respondent affirmatively invoked here. In any event, the State is incorrect. *Schneckloth* did not reject the idea that consent "waives" a defendant's right to prevent a search but rather rejected the defendant's argument that a consent search is subject to the strict standards applicable to the waiver of "trial rights." 412 U.S. at 241. On that basis, it held that police officers are not required to advise individuals of their right to refuse to consent to a search. *Ibid.* *Rodriguez* subsequently confirmed that "third party consent" does not amount to one person waiving the rights of another when that person has unilateral authority to admit the police to the premises. Such a search is "reasonable." See *Rodriguez*, 497 U.S. at 183 (quoting *Schneckloth* and distinguishing consent searches from waivers of trial rights).

Create an Extraordinary and Pervasive Sense of Personal Insecurity.

1. Refusing to recognize the effectiveness of an objection would engender the personal insecurity that the Fourth Amendment was enacted to prevent. On the State's view, any person's right to be free from warrantless governmental intrusion into his home is contingent on the acquiescence of every other occupant. The insecurity that arises from such a rule is visited upon the entirely innocent and upon persons whose homes are never, in fact, searched. It condemns everyone who lives with others to the constant prospect that the government can invade their privacy.

A right that can freely be overridden in such a fashion is grossly diminished in value. Indeed, it is hard to call such a conditional privilege a "constitutional right" at all. None of us has a genuine personal right to be let alone in our homes if everyone with whom we live at the moment has a superior right – whether out of whim, malice, ignorance, or fear – to admit the government. But that is precisely the State's position. Any occupant has the absolute right to admit the government to search the premises despite the objection of another resident – indeed, despite the objection of *all* the other residents.

The wholly contingent and ephemeral nature of privacy in the home under such a rule is plain. And the sense of personal insecurity that it would it create is extraordinary. For example, the State's position is that a search may be authorized by another resident even in the absence of any suspicion whatsoever, for consent searches are perfectly valid notwithstanding the lack of any suggestion of illegality. See 4 LaFave, *supra*, § 8.1 n.9. The search, when it occurs, will very likely intrude into our most private spaces because the State's rule would permit the police to search wherever there is "common authority" over the premises. Because few individuals distance themselves from their families to the extent of maintaining rooms that are separate and off-limits to

the others, such a search would presumably encompass the entire residence.[8]

Throughout the residence, the police could make the most exacting searches into private spaces. The level of privacy an individual can expect to preserve if the government is permitted to search his house under the theory that he has consented is minuscule. There are no limits on the breadth and depth of searches that rest on "consent" – to the contrary, such searches are notoriously extensive and lack any of the "particularity" required by a warrant. Officers may search through every drawer in every room and every file on every computer. *E.g.*, *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991) (consent includes authorization to open containers); *United States* v. *Martinez*, 949 F.2d 1117 (CA11 1992) (consent to search warehouse includes authorization to pry

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[8] Even in the rare instances in which such a separate space was maintained, there would be the significant risk that it would nonetheless be searched because the police mistakenly believed that there was common control over the premises. *Rodriguez*, 497 U.S. at 188-89. In this very case, for example, officers searched respondent's separate bedroom. According to the testimony at the suppression hearing, respondent and his wife were separated; she had returned to the home only to gather more belongings before leaving once again for Canada. Before entering the bedroom in which they found drug evidence during the "consent" search, officers were advised that it was respondent's own bedroom. See *supra* at 2. They had no reason to believe that Mrs. Randolph had authority over that part of the house. And while the trial judge stated summarily that Mrs. Randolph retained common authority over the residence generally (J.A. 23), he made no such finding with respect to the bedroom. Furthermore, respondent was "a practicing attorney [and] had an office in a room of the house." State Br. 3. The State recognizes that the consequence of its position is that even a search of the separate office would be valid if respondent's spouse had "apparent authority" over the residence (*ibid.*), which she very likely would. See, *e.g.*, *United States* v. *Clutter*, 914 F.2d 775, 778 n.1 (CA6 1990).

open trunk of vehicle found inside); *United States* v. *Ibarra*, 948 F.2d 903 (CA5 1991) (consent authorizes police to break into boarded-up attic). "In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. 27, 37 (2001). But on the State's view, *no* intimate detail is truly held safe from the government's eyes.

In most residences, numerous individuals could have sufficient "control" – or at least apparent control (see *Rodriguez*, 497 U.S. at 188-89) – to provide consent for sweeping searches. Thus, courts have held that sufficient "control" was exercised by, for example, a landlord who occasionally accessed a tenant's room to clean it. *United States* v. *Aghedo*, 159 F.3d 308 (CA7 1998). Another recurring scenario is consent granted by minor children. *E.g.*, *Clutter*, 914 F.2d 775 (fourteen-year-old and twelve-year-old); *United States* v. *Bethea*, 598 F.2d 331 (CA4 1979) (seventeen-year-old); *State* v. *Lotton*, 527 N.W.2d 840 (Minn. App. 1995) (ten-year-old); *Doyle* v. *State*, 633 P.2d 306, 309 (Alaska App. 1981) (child who appeared to be between the ages of eleven and fourteen); see also *Lenz* v. *Winburn*, 51 F.3d 1540 (CA11 1995) (announcing rule approving consent by minor children). On the State's view, children can freely override their parents' invocation of their Fourth Amendment rights.

In fact, despite the objection of every other occupant, the police would be free (indeed, if the State prevailed, would likely feel obligated) to continue to ask occupants seriatim for permission to search. Here, "after [respondent] had refused to give the officers permission to search," his wife consented. Pet. App. 1a. That is bad enough, but it is hardly the stopping point. Even if the father says "no" to a request to search, then the mother says "no," then the aunt living in the home says "no," there is always the realistic prospect that minor children or the guest in town for the week will say "yes." *E.g.*, U.S. Br. 18 (urging the Court to extend to this context its statement in *United States* v. *Karo*, 468 U.S. 705, 716 n.4 (1984), that

"[a] homeowner takes the risk that *his guest* will cooperate with the Government" (emphasis added)).

Any of these occupants is a potential source of authority to override the Fourth Amendment rights of all the others. None has to be told that the others have refused or that he has the right to do so as well. In effect, the State proposes to constitutionalize a principle that we routinely reject even in childrearing – that if you want something but are told "no," you can just ask the other parent. Such a rule – which places every person's personal privacy in the hands of the least discreet or most ignorant member of the household – is antithetical to the protection afforded to persons in their homes. "[I]f the Fourth Amendment means anything, it means that the police may not undertake a warrantless search of defendant's property after he has expressly denied his consent to such a search. Constitutional rights may not be defeated by the expedient of soliciting several persons successively until the sought-after consent is obtained." Pet. App. 13a (quoting *Lawton* v. *State*, 320 So. 2d 463, 465 (Fla. App. 1975)).

2. This Court has appropriately rejected claims that a search was valid on the basis of "third party consent" when, as here, it would leave individuals powerless to maintain their personal privacy. Thus, as discussed in Part I-C, *supra*, in cases such as *Stoner* v. *California*, 376 U.S. 483 (1964), *United States* v. *Jeffers*, 342 U.S. 48 (1951), and *Chapman* v. *United States*, 365 U.S. 610 (1961), this Court recognized that a rule that placed the Fourth Amendment right to be free from warrantless searches in the hands of third parties would render that right essentially meaningless because individuals would have no way to ensure their personal privacy.

These decisions are controlling here. It is inconceivable that this Court would have permitted the searches in *Stoner* and *Chapman* if the guests or tenants had actually been present and had objected, but that is essentially the rule for which the State is arguing. Like the guest in *Stoner* and the

tenant in *Chapman*, respondent did not relinquish control of the premises to any other person who had the authority to admit the police. Permitting his Fourth Amendment right to privacy in the home to be overridden in this circumstance would render that right a "nullity." *Chapman*, 365 U.S. at 616-17.

D. The State's Proposed Rule Serves No Substantial Law Enforcement Interest.

1. As discussed in Part I-A, *supra*, the Court's previous decisions sustaining consent searches have recognized that any minimal intrusion on privacy that exists after the waiver of the right to exclude the government is offset by the benefits to important law enforcement interests. In particular, when officers lack probable cause to secure a warrant, consent lets them pursue an investigation. In turn, the bright-line rule of *Matlock* is necessary to maintain the viability of consent searches. This Court has declined to construe the Fourth Amendment in a manner that would "create serious doubt whether consent searches could continue to be conducted." *Schneckloth*, 412 U.S. at 229. If consent by the only occupant present at the scene were not a valid basis for a search, it is difficult to see how consent searches could be conducted as a practical matter in many cases. Officers who solicit consent to search from a resident must be able to rely on the permission they receive in the absence of any objection. Otherwise, the police would constantly be obliged to identify and track down all the other occupants, a nearly impossible burden.

By contrast, there is no evidence that legitimate law enforcement concerns require the substantial further step of finding valid "consent" in the face of a clear objection by a person with a privacy interest in the premises. To the contrary, the existence of a cooperating occupant substantially reduces the need for the police to conduct a warrantless search. An occupant may, for example, bring particular items out of the house and give them to the police. The State makes

this very point: "Had [respondent's wife] simply avoided any verbal exchange with police about consent and elected instead to physically retrieve the straw with white residue on it from the upstairs bedroom where it had been in plain view, those voluntary actions would have been constitutionally permissible under [*Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971)]." Br. 17. Of course, the resulting seizure in that scenario is far less intrusive than the generalized search of the premises that the State would authorize based on no suspicion whatsoever. Equally important, a credible cooperating occupant can also provide the police with information sufficient to secure a warrant to search the premises. Credible first-hand observations offered by a resident unquestionably will establish probable cause. Respondent's position thus does not significantly diminish the ability of the police to conduct investigations and leaves ample room for a co-occupant to "cooperate with the authorities" (U.S. Br. 15) and to distance herself from alleged illegality (*id.* 21).[9]

2. The warrant process mandated by the Constitution better balances law enforcement interests and personal privacy. First, when a warrant is required, law enforcement officials will seek to assure themselves that the third party providing damaging information is actually reliable, since otherwise they will lack probable cause. Thus, they may decide not to seek a warrant if the information seems

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[9] The State's premise that the occupant granting consent does so voluntarily and enthusiastically is also questionable. Not only may the occupant not know of her right to refuse, but the State's proposed rule would create a classic "prisoners' dilemma" that would encourage co-occupants to abandon the right to privacy provided by the Constitution. When an individual declines to consent to a warrantless search, officers will be free to respond, "Don't you want to cooperate? Maybe we should ask the other people who live here." This tactic will inevitably create the impression that refusing to consent will taint the occupant with suspicion, producing extraordinary pressure to consent.

fabricated out of spite or if the third party's account lacks plausible details. Second, law enforcement officials must convince a neutral magistrate that there is probable cause to believe *particular* evidence or contraband will be found within the dwelling. Finally, the warrant itself must meet the particularity requirement, which means that any authorized search must be tailored to avoid intruding more than is necessary on privacy interests within the home, again a preferable approach to a free-ranging search of the entire residence. See, *e.g.*, *Groh* v. *Ramirez*, 540 U.S. 551, 559 (2004); *Michigan* v. *Clifford*, 464 U.S. 287, 298 (1984).

No doubt, the State would prefer that its officers not be put to the bother of getting a warrant. But that interest is manifestly insufficient to justify an exception to the warrant requirement. See *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (exceptions permitted only when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable"). "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." *Johnson* v. *United States*, 333 U.S. 10, 15 (1948). The Court has made precisely this point in rejecting claims that third parties validly consented to a search of private premises. *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951). The Georgia Supreme Court thus rightly refused to "exalt[] expediency over an individual's Fourth Amendment guaranties." Pet. App. 3a (quoting *State* v. *Leach*, 782 P.2d 1035, 1040 (Wash. 1989)). Accord *Steagald* v. *United States*, 451 U.S. 204, 222 (1981) ("Any warrant requirement impedes to some extent the vigor with which the Government can seek to enforce its laws, yet the Fourth Amendment recognizes that this restraint is necessary in some cases to protect against unreasonable searches and seizures."); *Wilson* v. *Layne*, 526 U.S. 603, 612 (1999) ("Were such

generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down.").

A warrant is particularly appropriate when, as in this context, the person invoking the Fourth Amendment is the target of the police inquiry. Most cases involving consent do not involve a loss of personal privacy because the target freely waives her right to require a warrant. By contrast, as the United States acknowledges, "third-party consent issues often arise when the consent is aimed to facilitate an investigation against a co-occupant." Br. 24. This Court has appropriately refused to find a search authorized when the supposed "consent" would be "no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth*, 412 U.S. at 228.

Nor is it correct that "giving effect to an occupant's consent may be necessary to avert destruction of contraband by the nonconsenting occupant" (U.S. Br. 22), such that the ruling below "would thwart the ability of law enforcement officials to locate and seize evidence of a crime before evidence is destroyed" (State Br. 17). As the Solicitor General elsewhere acknowledges, officers may simply secure the premises and particular individuals while they obtain a search warrant. Br. 22, 23 n.8 (citing *Illinois* v. *McArthur*, 531 U.S. 326 (2001); *Michigan* v. *Summers*, 452 U.S. 692, 702-03 (1982)). The destruction of evidence is also an exigent circumstance justifying a warrantless entry. *Welsh* v. *Wisconsin*, 466 U.S. 740, 749 (1984).

3. The State's broader rule permitting any resident to authorize a search over the objection of all the others actually has the potential to undermine law enforcement interests. A genuine assessment of law enforcement interests recognizes that the police are entrusted to protect individual rights, not merely to investigate crime. It disserves that vital social

function when officers ignore citizens' invocation of their rights:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

United States v. *Drayton*, 536 U.S. 194, 207 (2002). This Court has been appropriately wary of police practices that are "designed to circumvent" defendants' invocation of their rights. *Missouri* v. *Seibert*, 124 S. Ct. 2601, 2614 (2004) (Kennedy, J., concurring in the judgment) (invalidating two-step practice of initially questioning suspect without providing *Miranda* warnings, then providing warnings only before second round of questioning).

The State's rule also creates the troubling prospect that one occupant will grant consent in an attempt to shift blame onto others. Faced with inquiries from officers, an occupant "may believe in the classic hope that by cooperating with the police [s]he can keep their focus off of [her]." See Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 180 (1991). Indeed, the United States acknowledges that "an individual may have significant reasons of her own for consenting to a search." Br. 21. The consenting occupant may not only claim to officers that others in the residence are engaging in unlawful acts, but may also direct them to areas that would draw suspicion only to them. *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."). Under such circumstances, it is particularly unjustifiable to impute the consenting individual's assent to an individual who has objected.

Indeed, as the courts below explained, a pernicious consequence of the practice employed in this case is the very real prospect that the police will be used as pawns in domestic disputes, with one member of the household inviting a search by the police to harm another. Requests for third party consent often arise in the midst of domestic disputes. See, *e.g.*, *United States* v. *Donlin*, 982 F.2d 31 (CA1 1992); *United States* v. *Hendrix*, 595 F.2d 883 (CADC 1979); *Brandon* v. *State*, 778 P.2d 221 (Alaska Ct. App. 1989). The party granting consent may do so out of personal spite, rather than a desire to cooperate with the police, with the result that constitutional privacy will ebb and flow based on the state of our personal relationships. This case, in which respondent's wife consented in the midst of a domestic dispute, is a perfect illustration. "This was a marriage about to break apart." Oct. 3, 2002 Suppression Transcript 15-16 (testimony of investigating officer). As the court of appeals recognized:

> The facts of this case illustrate the problem with dueling responses to a request for consent to search. The Randolphs were clearly at odds, hurling accusations of wrongdoing at one another. Thus Mrs. Randolph's motive for consenting to the search in the face of her husband's refusal is troubling. Under these circumstances, it is preferable that a neutral magistrate determine whether Mrs. Randolph's accusations were founded or whether they stemmed from the ongoing altercation.

Pet. App. 10a n.6. "Testimony given by Sergeant Murray indicated that he could verify neither accusation" by these "bickering spouses." *Id.* 24a. Even if no incriminating information had been found during the search, respondent's expectation of privacy would have been shattered by police intrusion into the innocent – but perhaps embarrassing – details of his life.

A search by the police of the residence in this situation exacerbates family discord, inevitably escalating the disputes

in question. The Constitution should not be construed to undermine familial institutions, including marriage, by setting family members against each other. The court of appeals reasoned persuasively: "When possible, Georgia courts strive to promote the sanctity of marriage and to avoid circumstances that create adversity between spouses. Allowing a wife's consent to search to override her husband's previous assertion of his right to privacy threatens domestic tranquility." Pet. App. 10a-11a (citing *Robeson* v. *Int'l Indem. Co.*, 248 Ga. 306, 308-09 (1981)). Not only has this Court long recognized the privileged constitutional status of marriage and family generally (see, *e.g.*, *Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965)), but the Fourth Amendment in particular contributes to the protection of those institutions (see, *e.g.*, *California* v. *Ciraolo*, 476 U.S. 207, 212-13 (1986) ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.")).[10]

[10] Cases involving disagreements among the occupants also threaten to insert the police into indeterminate disputes about the breadth of one occupant's authority to consent to a search to various portions of a residence. "[W]e unreasonably burden law enforcement officers when we require them to stake the later admissibility of any evidence seized on their ability to immediately and fully divine a consenter's relationship to the premises and to the objecting co-occupant as well as the consenter's motives in giving consent to search." Pet. App. 18a (Ellington, J., concurring). The United States thus acknowledges that there will be cases "involv[ing] circumstances in which two occupant have differing degrees of authority over the residence," thereby forcing officers to confront knotty cases involving the search of "a particular area of the house over which [the objecting occupant] had greater authority." Br. 27. In this very case, the State acknowledges the difficulties that would have arisen "had Mrs. Randolph given consent for police to search her husband's law office, which was also in the Randolph home, and contraband was only found in the law office." Br. 18. But neither the State nor the Solicitor General provides any ready means of resolving this quandary. In construing the Fourth Amendment, "[t]he people in their houses, as well as the police, deserve more precision." *Kyllo*, 533 U.S. 27, 39 (2001).

4. The State's remaining arguments merely amount to requests to adopt wholesale exceptions to the warrant requirement that are contrary to the plain text of the Constitution and this Court's Fourth Amendment precedents. The State contends that "[t]here is no legitimate interest in possessing contraband, so that 'government conduct that only reveals the possession of contraband compromises no legitimate privacy interest.'" Br. 18 (quoting *Illinois* v. *Caballes*, 125 S. Ct. 834, 837 (2005)). But a search of a residence – unlike the dog sniff in *Caballes* – manifestly *does* reveal a host of private facts beyond the possession of contraband. The State's argument therefore seems instead to be that no Fourth Amendment violation occurred because the police seized drugs. The constitutional violation, however, arises in the first instance from the warrantless search, and cannot be excused by the subsequent seizure. The State's contrary argument – that no Fourth Amendment violation occurs so long as the police seize contraband – would render the exclusionary rule a nullity.[11]

[11] The United States also contends that the Georgia Supreme Court's ruling will "give officers an incentive to adjust the timing of a request for consent" because officers "could wait for an objecting occupant to leave before seeking consent from a cooperating co-occupant." Br. 23. If the Solicitor General is truly serious that police officers are committed to circumventing the Court's Fourth Amendment rulings, that is a reason for *increasing* the burden for permitting a warrantless search of the residence. But in any event, this argument is meritless. Under the State's proposed rule, officers have an indistinguishable incentive to "adjust the timing of a request for consent" by "wait[ing] for [a cooperating] occupant to [arrive] before seeking consent." *Ibid.*

The State's further assertion that its rule is necessary to deal adequately with a "case involving child or spouse abuse, which has not yet ripened into exigent circumstances, and * * * the abuser * * * refuses police access to check the premises for signs of abuse," Br. 19, is a red herring. As the State implicitly acknowledges, if there genuinely is a present risk of harm to the victim, the police do not need a warrant to enter the premises. And in all other cases, nothing prevents the victim from leaving the home and seeking police assistance in finding safe shelter, seeking a temporary restraining order, or pressing criminal charges. Given these alternatives, it is incumbent upon the State to explain why a warrantless search should be permitted in the absence of exigent circumstances. The very premise of the Fourth Amendment is that in such ordinary circumstances the Constitution entrusts neutral magistrates, rather than police officers on the street, with the responsibility to determine whether there is probable cause to believe that an individual is, for example, an "abuser." No one doubts that the personal statements of a credible victim would be sufficient to secure a search warrant.[12]

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[12] Nor does the body of lower-court case law otherwise support the conclusion that it is "reasonable" to override the Fourth Amendment objection of an occupant. A number of state supreme courts squarely support the ruling below. See *supra* at 4 & n.1. A large proportion of the decisions cited by the State and the Solicitor General as supposedly holding to the contrary are inapposite because they did not involve an objection. *United States* v. *Lewis*, 386 F.3d 475 (CA2 2004); *United States* v. *Aghedo*, 159 F.3d 308 (CA7 1998); *Lenz* v. *Winburn*, 51 F.3d 1540 (CA11 1995); *United States* v. *Baldwin*, 644 F.2d 381 (CA5 1981); *United States* v. *Bethea*, 598 F.2d 331 (CA4 1979); *People* v. *Sanders*, 904 P.2d 1311 (Colo. 1995); *State* v. *Zimmerman*, 529 N.W.2d 171 (N.D. 1995); *In Re Anthony F.*, 442 A.2d 975 (Md. 1982); *State* v. *Frame*, 609 P.2d 830 (Or. App. 1980); *State* v. *Washington*, 357 S.E.2d 419 (N.C. App. 1987); *Welch* v. *State*, 93 S.W.3d 50 (Tex. Crim. App. 2002). The remaining cases overwhelmingly do not consider the question of "reasonableness" as an abstract matter but rather misread this Court's decision in *Matlock* to compel a finding that consent is valid in these circumstances.

[13] *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990), reinforces *Stoner*'s reasoning. The question in *Rodriguez* was whether consent was valid when granted by a person who reasonably, but erroneously, appeared to have common authority over the premises. The majority and dissent in *Rodriguez* disagreed over whether *Stoner* prohibited reliance on "apparent authority." The majority concluded that *Stoner* precluded "only such reliance upon apparent authority as is unrealistic." *Id.* at 187. Compare *id.* at 194-95 &

II. There Is No Merit to the State's Argument That This Court's Third Party Consent Precedents Compel Reversal of the Ruling Below.

The State contends that the Supreme Court of Georgia's decision cannot be reconciled with this Court's "third party consent" decisions. Those cases, it contends, confer on each resident of jointly occupied premises the inviolate right to admit the police notwithstanding the other occupants' invocation of their Fourth Amendment rights. This Court's precedents do not support that extraordinary contention.

A. The State Misreads This Court's Decision in *Matlock*.

As discussed in Part I-A, *supra*, the controlling precedents here are *Stoner* v. *California*, 376 U.S. 483 (1964), and *Chapman* v. *United States*, 365 U.S. 610 (1961). Those decisions reject claims that valid third party consent was granted by persons with property interests in the premises when it could not fairly be said that the occupant had relinquished the authority to admit the police. A rule that holds that an individual loses his right to privacy notwithstanding that he has not waived his rights "by word or deed, either directly or through an agent" would cause the Fourth Amendment's protections to "disappear." *Stoner*, 376 U.S. at 489, 490.[13]

United States v. *Matlock*, 415 U.S. 164 (1974), is not to the contrary. In that case, the police searched a home in which several people resided – including two parents (who rented the home), their daughter, her live-in companion (the defendant), and a grandchild. The police arrested the defendant in the front yard of the house and secured him in a squad car on the street. They then sought and received consent from the daughter to search the residence, finding drugs. Of particular note, the defendant did not object to the search. This Court held the consent was valid.[14]

The holding of *Matlock* obviously says nothing about the very different circumstance in which an occupant *does* object. To the contrary, language in *Matlock* supports respondent's position. The Court in *Matlock* explained that prior precedent established that "the consent of one who possesses common authority over premises or effects is valid as against the *absent*, nonconsenting person with whom that authority is shared." 415 U.S. at 170 (emphasis added). In support, it cited *Frazier* v. *Cupp*, 394 U.S. 731 (1969), a case in which the defendant (Frazier) had left a duffel bag that he jointly owned with another person (Rawls) in Rawls's mother's house. The police came to the house when Frazier was not

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n.1 (Marshall, J., dissenting) (arguing that *Stoner* precludes "apparent authority" altogether). The relevant point for present purposes is that, when one occupant purports to grant consent over the objection of another, there is no "apparent authority" whatsoever, let alone a "realistic" appearance of authority.

[14] As noted, the defendant in *Matlock* was arrested in the front yard, and was being held in a police car when the officers sought consent. The case could accordingly be characterized as involving the Fourth Amendment rights of either an "absent" occupant or, alternatively, one who was present but did not object. For the reasons discussed in the text, the difference is immaterial. One just as clearly relinquishes control by not objecting when a co-occupant admits a third party to the premises as by leaving the premises in the hands of the co-occupant altogether.

there and secured permission from Rawls and his mother to search the bag. *Id.* at 740. The Court held that the police had received valid consent because Frazier had relinquished control to Rawls: "[I]n allowing Rawls to use the bag, and in leaving it in his house, [Frazier] must be taken to have assumed the risk that Rawls would allow someone else to look inside." *Ibid.*

The State has no explanation for why this Court emphasized in *Frazier* and then reiterated in *Matlock* the relevance of the absence of the property owner. On the State's view, that fact was utterly irrelevant. The State's rule would have permitted Rawls to authorize a search even over the objection of Frazier had he been present. *Matlock* moreover did not purport to disturb the Court's prior holding that common authority is, in many circumstances, simply insufficient to authorize third party consent. See Part I-A, *supra*.

This Court's further statement in *Matlock* that persons with "common authority" over the premises may consent to a search must be understood in the context of the facts of the case and the Court's reliance on *Frazier*. The right of another occupant to enter a countervailing objection to a search was not before the Court. Properly understood, as discussed above, "common authority" is only sufficient in circumstances in which it is fair to say that the nonconsenting resident has relinquished control of the premises to his co-occupant in his absence. It is only in such circumstances that "it is reasonable to recognize" the right of the co-inhabitant to provide third party consent to the search. *Matlock*, 415 U.S. 171 n.7.[15]

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[15] *Illinois* v. *Rodriguez*, 497 US. 177 (1990), reinforces this conclusion. The dissent in *Rodriguez*, like respondent here, explained that consent searches rest on a voluntary relinquishment of personal privacy. *Id.* at 190. Notably, the majority in *Rodriguez* did not take issue with this characterization of the Court's precedents. Rather, the disagreement turned on whether the

The State contends to the contrary that an occupant's "common authority" over the premises is itself a sufficient *source* of his alleged authority to grant consent over the objection of another occupant. That assertion misunderstands the Court's reference to "common authority," which instead described the class of persons who presumptively have the authority to consent because they themselves are occupants of the property to be searched. That is obvious from the remainder of the sentence in question, which explains that consent may be granted by persons "who possessed common authority over *or other sufficient relationship* to the premises or effects sought to be inspected." 415 U.S. at 171 (emphasis added). Such a relationship would presumably include, for example, a housesitter or long-term guest, individuals who have no "common authority" with the actual property owners. If such a person decides to admit the police, that decision will be effective except with respect to other occupants who state an objection.

In any event, the State does not actually rely on a "common authority" over the premises. Rather, its position is necessarily that respondent's wife had a *superior* authority to control access to the home. The State and its *amici* thus argue that "no co-occupant can reasonably expect to have total control over a premises he or she shares with another" (State Br. 19) and that "[b]y entering into a joint occupancy, an individual relinquishes any unilateral entitlement to determine whom to allow on the premises and when to permit entry" (U.S. Br. 15). In this case, the State says, respondent's wife had "just as much authority over the residence as [he] did." Br. 16-17. But the State and its *amici* then inexplicably

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relinquishment (i) vitiated the individual's expectation of privacy such that no "search" occurred, or (ii) instead rendered the search "reasonable." The majority adopted the latter view. As a consequence, the Court held, a reasonable mistake about the authority of a person to grant consent will not invalidate a search. *Id.* at 186-87 n.*.

maintain that the right of respondent's wife to control access to the premises trumps her husband's, such that in the event of a disagreement, her decision to admit the police prevails over his decision to exclude them. This inviolate, unilateral power hardly can arise from the "common authority" the State and its *amici* insist co-occupants share.

The State also notes that a footnote in *Matlock* stated that a co-occupant has the right to grant consent "in his own right." 415 U.S. at 171 n.7. But that statement is perfectly consistent with respondent's position. When one occupant relinquishes control to another, the latter has the right to admit others to the premises "in his own right." What the State cannot establish – because *Matlock* does not suggest it – is that an occupant's "own right" to admit others overrides the express objection of his co-occupants.

B. There Is No Source for the Supposed Right of One Occupant to Admit the Police to Search a Home over the Objection of a Co-Occupant.

The State's claim that one occupant may override the Fourth Amendment objections of all the others is insupportable for the further reason that it completely fails to identify any source for that supposed right. Such an extraordinary power must be rooted in *something*. The power to override a vital constitutional protection cannot be conjured from thin air. The State and its *amici* suggest two possible sources: an affirmative right in the common law; and social expectations regarding the relationship among co-occupants. Neither can be reconciled with this Court's precedents.

1. The Common Law of Property Does Not Support the State's Position.

The United States invites this Court to hold that the search in this case was valid on the basis of an affirmative right possessed by his wife. The Solicitor General thus opines that the "foundational premise of the law of consent searches" – apparently so foundational that the government

cannot identify any supporting authority at all – is that "an individual may make a voluntary decision to permit the police to inspect property over which she has control." Br. 5. The source of this alleged right is mysterious. Obviously, no one has a "constitutional right to admit the police." The fact that an individual may waive his right to exclude the government does not suggest that, conversely, an individual has a constitutional right to admit the police over the objection of his co-occupants. See *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.").

The Solicitor General instead suggests that respondent's wife had the inviolate authority to admit the police based on the common law of property. Br. 16 n.4. In support of this claim, it cites various cases describing the rights of tenants in common. *Ibid.* This Court's precedents, however, firmly reject this proposed reliance on property rights. Even the State makes this very point, acknowledging that this Court "has moved away from relying upon distinctions developed in property and tort law and looks to whether 'the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" State Br. 10 (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978)). The State recognizes that *Matlock* in particular "made clear this 'common authority' is not derived from property law," State Br. 15, as this Court stated unambiguously that "[t]he authority which justifies the third-party consent does not rest upon the law of property," *Matlock*, 415 U.S. 164, 171 n.7 (1974). In support, *Matlock* cited both *Chapman* and *Stoner*, which held that hotel owners and landlords could not grant consent despite their property interests in the premises. *Ibid.* The Solicitor General similarly acknowledges that fact, but then inexplicably ignores it. See Br. 16 n.4 ("Although *Matlock* observes that the authority of a third party to give effective consent to a search does not rest on the particularities of a cotenant's right under the law of property,

a cotenant's ability to preclude a search consented to by another cotenant is consistent with the common law.").

The Court has thus repeatedly held that the Fourth Amendment confers a personal right of privacy that does not depend on antecedent property interests, including the ability to completely control access to the premises. The right to privacy runs with the person, not with the place or with the ownership of the property. The police must respect the Fourth Amendment rights of an individual, not those of a "house." The classic example of this proposition is *Katz* v. *United States*, 389 U.S. 347 (1967). In *Katz*, this Court held that the defendant had a protected privacy interest in a public phone booth, in which he obviously held no property rights. As a matter of property law, *any person* could have invited the police to enter the phone booth, for officers needed no authorization at all. Yet, despite the fact that Katz had no power under the common law to prevent the police from entering the phone booth, the Court recognized that he had a constitutionally protected right of privacy in that space for the period of his conversation. In language that would later be oft-repeated, the Court held: "[T]he Fourth Amendment protects people, not places." *Id.* at 351. To take another simple example cited by this Court, "[i]f the untrammeled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents' veto." *Minnesota* v. *Olson*, 495 U.S. 91, 99-100 (1990). That she in fact does have such an expectation completely undermines the State's position.[16]

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[16] Thus, the fact that the police did not commit a common law "trespass" in this case (U.S. Br. 16 n.4), is irrelevant: this Court has firmly "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property." *Kyllo* v. *United States*, 533 U.S. 27, 32 (2001).

It accordingly makes no difference whether respondent's wife had a property right to admit third parties into the home as a general matter. The question is not whether she had the authority to admit the police under state law or custom, but whether the Fourth Amendment prohibited the police from accepting the invitation in light of respondent's objection. To hold that the supposed right of respondent's wife to admit the police trumps respondent's objection is to nullify respondent's Fourth Amendment right to be free from a warrantless intrusion by the police. "While a co-inhabitant has authority to consent to a search of joint premises, 'a present, objecting party should not have his constitutional rights ignored * * * [due to a] property interest shared with another.'" Pet. App. 3a (quoting *Silva* v. *State*, 344 So. 2d 559, 562 (Fla. 1977)).

Each of us thus retains the full force of our right to personal privacy in our home despite the fact that few of us have complete control over who enters our residence. Those who own or lease property frequently have co-owners or co-lessees with equivalent rights to admit or exclude. Others who hold no distinct property interests – children and guests, in particular – may have no common law property rights *at all* to control access to the premises. Nonetheless, each has a

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The *amicus curiae* brief of the National Association of Criminal Defense Lawyers moreover demonstrates that the Solicitor General misdescribes the relevant body of property law. See also, *e.g.*, THOMAS W. WATERMAN, TREATISE ON THE LAW OF TRESPASS § 783 (N.Y. 1875) ("If a father give his son verbal permission to sell timber, and receive the avails, an action of trespass cannot be maintained against the vendee of the son, for cutting and removing the timber. But the wife, when she is not the general agent of her husband, nor specially authorized to act in the particular instance, cannot grant a valid license to a stranger to enter on her husband's land, and remove property therefrom in his absence.").

constitutionally recognized "reasonable expectation of privacy."

2. Reliance on the law of property is moreover both grossly underinclusive and overinclusive with respect to the persons who can grant consent to search. It is underinclusive because many occupants who have sufficient "control" over the premises to grant consent under the *Matlock* framework have *no property rights whatsoever*. In *Matlock* itself, for example, the premises were leased by the parents of the defendant's companion. At the time of the search, the house was also occupied by their daughter and the defendant, and the former individual was held to have granted valid consent despite the fact that she had no property rights in the premises. In this very case, the residence was owned by respondent's parents. Although the record is silent on the point, it would not be at all surprising in these circumstances if it were respondent who personally had an agreement to lease the premises (given that he personally paid the rent), such that respondent's wife would hold no leasehold interest. Consent to search is also regularly sought and received from minor children who have no property rights in the premises, including the right to bring in social guests. See *supra* at 23-24.[17]

Conversely, the government's reliance on property rights as the source for the "control" allowing consent to search is also overinclusive. As noted, parties with property rights (*e.g.*, hotel owners or landlords) often do not possess the form of "control" necessary to give rise to a right to consent to a

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[17] The common law principles of property law cited by the Solicitor General (Br. 16 n.4) thus undermine its position. Each assumes that the person granting consent holds a property interest in the premises. Stripped of that false premise, property law actually would dictate a holding that persons who do not hold a property interest (including, in all likelihood, respondent's wife) cannot consent to entry by the police over the objection of a property owner or leaseholder.

search even though they have a property right in the premises. Moreover, on the government's view, the very individuals who do have property rights may have their wishes overridden by those who do not. When consent is granted by children, for example, any objections of the parents who own the residence are overridden. Similarly, according to the State, the parents who leased the home in *Matlock* would have been powerless to object to the search.

2. There Is No Basis for the State's Reliance on a Supposed Social Understanding That One Occupant May Admit Guests Over the Objection of the Others.

The State argues that the search of respondent's home over his contemporaneous objection was nonetheless constitutional because he had a "reduced expectation of privacy" as a consequence of the fact that he did not live alone. Inescapably, this argument is an assault on the bedrock principle that the protections of the Fourth Amendment are at their apex – not their nadir – in the home. See Part I-B, *supra*. Neither of two variations on this argument made by the State has any merit.

1. Although its position is never entirely clear, the State seemingly relies on the assumption that there is a social understanding among co-occupants that each may admit guests over the objections of the others. But that assumption is simply wrong: no one expects that his cohabitants will, over his objection, grant a guest permission to enter the house, much less enter and rummage through the occupants' rooms and possessions. As the court of appeals explained, "it is reasonable for an occupant to believe his wishes will be honored as, 'ordinarily, persons with equal rights in a place would accommodate each other by not admitting persons over another's objection while he was present.'" Pet. App. 9a (quoting *State* v. *Leach*, 782 P.2d 1035, 1038 (Wash. 1989) (quoting, in turn, 3 LaFave, *supra*, § 8.3(d) at 251-52))).

This Court's decision in *Minnesota* v. *Olson*, 495 U.S. 91 (1990), is highly instructive. There, the Court held that the Fourth Amendment protects an overnight guest, notwithstanding that she has no right to control the entry of others into the home:

> The host may admit or exclude from the house as he prefers, but it is unlikely that he will admit someone who wants to see or meet with the guest over the objection of the guest. On the other hand, few houseguests will invite others to visit them while they are guests without consulting their hosts; but the latter, who have the authority to exclude despite the wishes of the guest, will often be accommodating. The point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.

Id. at 99. As Justice Kennedy has explained, there is thus a "social custom" that those with property rights over the residence "will exercise [their] discretion to include or exclude others for the guests' benefit," and "where these social expectations exist * * * they are sufficient to create a legitimate expectation of privacy, *even in the absence of any property right to exclude others*." *Minnesota* v. *Carter*, 525 U.S. 83, 101 (1998) (emphasis added).[18]

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[18] Also analogous is *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001), in which the question was whether the Fourth Amendment rights of hospital patients were violated when hospital officials, in a program created in coordination with law enforcement officials, turned over the results of those patients' drug tests to police. The dissenters argued that there could be no Fourth Amendment violation because the hospital officials who disclosed the information were private parties. *Id.* at 94 (Scalia, J., dissenting) (citing *United States* v. *White*, 401 U.S. 745, 749

Indeed, even if a resident defied social convention and sought to admit a third party over the objection of his co-residents, the third party himself would likely decline to enter in the face of the awkward dispute. But at the very least, it is almost impossible to imagine that the guest would be admitted before the other residents were first given the opportunity to secure any items or areas that they wanted to keep private and, once admitted, would be permitted to root around in the other residents' belongings.

The same logic applies *a fortiori* to a person such as respondent who, unlike a guest, actually owns or leases the residence and as a consequence has at least co-equal authority to control access to the premises. Such a person retains an undiluted expectation of privacy in the home even if his co-owners or co-lessees technically have the property right to admit another guest over his objection.

There is moreover never a greater expectation among occupants that each will have the opportunity to speak for himself than when the government seeks to intrude into the

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(1971)). The majority rejected that argument, explaining that although it was *possible* that hospital officials would disclose the information, patients would not reasonably *expect* them to do so. "The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Id.* at 78. The Court explained in an accompanying footnote: "While the existence of such laws [requiring medical professionals to provide evidence to the authorities in certain circumstances] might lead a patient to expect that members of the hospital staff might turn over evidence acquired in the course of treatment to which the patient had consented, they surely would not lead a patient to anticipate that hospital staff would intentionally set out to obtain incriminating evidence from their patients for law enforcement purposes." *Id.* at 78 n.13. See *id.* at 97 n.4 (Scalia, J., dissenting) ("I think it clear that the Court's disposition requires the holding that violation of a relationship of trust constitutes a search.").

home. Faced with a request from the police to conduct a warrantless search of a residence, it is unlikely in the extreme that all of the residents would remain disinterested and elect to leave the decision to the happenstance of whomever the officers meet at the door when they are present and able to decide for themselves whether to object. All of the occupants may decide that they want to cooperate with the police, and none may ultimately voice an objection to another occupant's decision to admit the police, but the relevant point is that each will expect the *opportunity to decide*. The State's contrary position that each resident freely intends to irrevocably cede to all the others his personal right to privacy in the home – a vital constitutional protection – is implausible.

But even if one resident chose to invite others into the house over the expressed objection of other residents, that fact would not translate into carte blanche for one resident to invite the *government* to enter the home over other residents' objections. Even assuming that respondent's wife had the power to admit social guests over his objection (an ambitious assumption, given that the State cites no authority in support of it), she would not as a consequence have the equivalent right to admit the *police*. The government simply stands in a different relationship to the individuals within a dwelling than do private parties. Private individuals do not have the authority, simply by entering a house and noticing incriminating information within it, to initiate a criminal prosecution. Indeed, an individual who entered a private dwelling with the consent of one individual but then intentionally interfered with the rights of other residents would face potential civil liability. Moreover, the level of intrusion on an individual's privacy that comes from "permit[ting] law enforcement officers to inspect * * * commonly held premises," U.S. Br. 18, is of a dramatically greater magnitude than the intrusion one risks when social guests enter the home. Social guests do not root through bedrooms, closets, closed doors, and computer files.

2. Nor can the State's argument be resuscitated on the theory that – notwithstanding the expectation that co-occupants will respect each others' wishes – one occupant may nonetheless admit the police, so that each occupant "assumes the risk" that his or her objection will be overridden. Standing alone, this argument merely begs the question presented by this case. In *Stoner*, for example, it could equally be said as an abstract matter that a guest assumed the risk that hotel employees – who had the right to be in the room – would admit the police.[19] This Court held, however, that the Fourth Amendment prohibited such an intrusion. So, too, in this case: if the Georgia Supreme Court is correct that an occupant's objection may not be overridden, then no such "risk" is "assumed."

The Solicitor General contends that the facts of this case are analogous to those in the line of decisions holding that when an individual reveals private information about himself, "the disclosing individual 'assumes the risk that his confidant will reveal that information to the authorities.'" U.S. Br. 17 (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984)). In fact, this case is utterly unlike those in the two most important respects. First, respondent in this case kept the contents of his home private, whereas the defendants in those cases voluntarily disclosed private information to third parties. Those rulings stand for the proposition "that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith* v. *Maryland*, 442 U.S. 735, 743-44 (1979) (summarizing the line of

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[19] The same would be true if this Court held that one occupant may validly consent to the strip-search of another – each occupant could be said to have "assumed the risk" that he would be subjected to strip-searches despite his own objection. However, simply asserting that an occupant assumes such a risk does nothing to assist the Court in determining whether such a rule should, in fact, be adopted.

authority cited by the Solicitor General).[20] But those cases have never been read to establish that in addition to having access to the information thus disclosed, the police may also search the premises where the conversation took place without a warrant.

Second, respondent has a Fourth Amendment right to be free from a warrantless search of his home, whereas those defendants had no right to keep the police from talking to the people to whom they had disclosed information. The cases cited by the Solicitor General thus carefully distinguish "an intrusion into a zone of privacy." *Miller*, 425 U.S. at 440. Specifically invoking the holding of *Jeffers*, *supra*, that a hotel employee may not authorize a search of a guest's room, this Court explained in *Hoffa* v. *United States*:

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure.

385 U.S. 293, 301 (1966).

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[20] See, *e.g.*, *Smith*, 442 U.S. at 735 (pen register: "When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed."); *United States* v. *Miller*, 425 U.S. 435, 440 (1976) (bank records: "All of the documents obtained * * * contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.").

CONCLUSION

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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No. 01-1067

IN THE

Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

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QUESTION PRESENTED

Whether the police may search a home based on the putative consent of one occupant when another present occupant of the home expressly objects to the search.

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IN THE

Supreme Court of the United States

No. 04-1067

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Writ of Certiorari
to the Supreme Court of Georgia

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE

National Association of Criminal Defense Lawyers (NACDL) is a nonprofit national bar association working in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and due process for persons accused of crimes and to foster the integrity, independence, and expertise of the criminal defense profession. NACDL has more than 12,500 members—joined by 90 affiliate organizations with 35,000 members—including criminal defense lawyers, U.S. military defense counsel, law professors, and judges

committed to preserving fairness within America's criminal justice system.

This case concerns whether the Fourth Amendment permits the police to enter the home of a potential criminal defendant without a warrant where he is present and objecting, simply because another occupant of the home—his spouse—purports to consent to the search. NACDL and its members have a strong interest in ensuring proper application of Fourth Amendment principles in this context and in ensuring that the law accords appropriate respect to an individual's effort to exclude others from the most sensitive of places, the home. NACDL has appeared as *amicus curiae* in numerous Fourth Amendment cases in this Court. See, *e.g.*, *Muehler* v. *Mena*, 125 S.Ct. 1465 (2005); *Denvenpeck* v. *Alford*, 125 S.Ct. 588 (2004); *United States* v. *Drayton*, 536 U.S. 194 (2002); *United States* v. *Knights*, 534 U.S. 112 (2001); *Kyllo* v. *United States*, 533 U.S. 27 (2001).[1]

STATEMENT OF THE CASE

1. Before May of 2001, respondent Scott Fitz Randolph and his wife lived in a house they rented from respondent's father in Americus, Georgia. 10/3/02 Tr. at 30, 33. In late May of 2001, the couple separated. Mrs. Randolph took the couple's son and most of her clothing and went to stay with her parents in Canada. Respondent remained in the marital home. *Id.* at 23; Pet. App. 7.

[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

On or about July 4, 2001, Mrs. Randolph returned to the home with their child. Pet. App. 7. She informed respondent that she intended to collect more of her belongings and return to Canada. 10/3/02 Tr. at 24.

On the morning of July 6, 2001, respondent awoke to find Mrs. Randolph highly intoxicated. 10/3/02 Tr. at 24-26. The couple argued, and Mrs. Randolph said she was going to collect her things and leave the house. *Id.* at 27. Respondent took their son to the house of a family friend. *Id.* at 27-28. While respondent was gone, Mrs. Randolph called the local police department. When the police arrived, Mrs. Randolph complained that respondent had taken their child away. She also claimed that respondent's cocaine use was causing the couple financial problems. Pet. App. 7. During that same conversation, Mrs. Randolph revealed to the police that she and respondent were having marital problems, that she had separated from him, and that she had recently left the home for over a month to stay with her family in Canada. 10/3/02 Tr. at 14-15.

When respondent arrived at his home, he found his wife there along with the police. He told the police where he had taken the child. He had been concerned, he explained, that Mrs. Randolph would again take their son out of the country. Pet. App. 7-8. After retrieving the child, one of the officers told respondent about Mrs. Randolph's allegations of cocaine use. *Id.* at 8.

The officer asked respondent for permission to search the house. Respondent unequivocally said "no." 10/3/02 Tr. at 8; Pet. App. 8. The officer then turned to Mrs. Randolph and asked for her consent. Mrs. Randolph agreed. Over respondent's objection, Mrs. Randolph then, in the officer's words, "showed [him] a bedroom upstairs in the back corner that was reported to be Mr. Randolph's." 10/3/02 Tr. at 8. Peering in the doorway, the officer observed "a piece of cut straw on top of a jar."

Ibid. Upon closer examination, the officer thought he saw white residue on the straw, which led him to believe the straw was used to ingest cocaine. *Ibid.*

The officer left the house to retrieve an evidence bag and to contact the district attorney. The district attorney told the officer to stop the search and obtain a warrant. 10/3/02 Tr. at 9; Pet. App. 8. The officer returned to the home, at which point Mrs. Randolph said she was withdrawing her consent to the search. The officer collected the straw and white residue and went to the police station with respondent and Mrs. Randolph. Pet. App. 8. The officer then obtained a search warrant for the home. During the ensuing search, the police seized numerous drug-related items. *Ibid.*

On November 21, 2001, an indictment was filed against respondent for possession of cocaine. J.A. 1. On January 17, 2002, respondent filed a motion to suppress all evidence seized from his home. The Superior Court denied the motion, holding that Mrs. Randolph was "still in possession of common authority to grant consent for police to search the marital home." J.A. 23.

2. The Georgia Court of Appeals granted respondent's application for interlocutory appeal and reversed. Pet. App. 7-47. The court held that it is "inherently reasonable that police honor a present occupant's express objection to a search of his dwelling, shared or otherwise." *Id.* at 10. "If 'common authority' is the basis for allowing one co-occupant to consent to a search on behalf of all occupants," the court explained, "it seems reasonable that 'common authority' should permit a co-occupant to exercise privacy rights on behalf of all occupants." *Ibid.* That result was "particularly reasonable" in cases involving marital disputes, the court added. "Allowing a wife's consent to search to override her husband's previous assertion of his right to privacy threatens domestic tranquility." *Ibid.*

The court of appeals acknowledged that, in *United States* v. *Matlock*, 415 U.S. 164 (1974), this Court had held that one cotenant could consent to a search of the dwelling he shared with others. Pet. App. 8-9. But the court of appeals held that *Matlock* was "factually and legally distinguishable" because the nonconsenting tenant in that case was not present and objecting to the search. Here, respondent was "not only present, but he affirmatively exercised his Fourth Amendment right to be free from police intrusion by refusing to consent to the search of his house." *Id.* at 12.

3. The Supreme Court of Georgia affirmed. Pet. App. 1-6. The court assumed that it was "faced with a situation in which two persons have equal use and control of the premises to be searched." *Id.* at 1. Under those circumstances, the court held, "the consent to * * * a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." *Ibid.*

Like the court of appeals, the Georgia Supreme Court distinguished *Matlock*. The Georgia Supreme Court pointed out that, in *Matlock*, the defendant challenging the search had not been present on the scene when the police sought consent from a cotenant. "[T]he risk assumed by joint occupancy," the Georgia Supreme Court stated, is "merely an inability to control access to the premises during one's absence." Pet. App. 3 (internal citations omitted). Quoting the Supreme Court of Washington, the Georgia Supreme Court concluded that, "should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent. Any other rule exalts expediency over an individual's Fourth Amendment guaranties." *Ibid.* (quoting *State* v. *Leach*, 113 Wash. 2d 735, 744 (1989)).

Three Justices dissented. In their view, respondent had "assumed the risk that because of his diminished expectation of privacy he had in the home he shared with his wife, she would expose their common private area" to a search. Pet. App. 6 (internal citations omitted).

SUMMARY OF ARGUMENT

The Fourth Amendment does not permit the police to enter a home and conduct a warrantless search, without exigent circumstances, in direct defiance of a present and objecting occupant who expressly refuses to consent to the search.

A. The expectation of privacy is at its apogee when a citizen is in his home and, in particular, the marital home. That expectation is reflected in the most fundamental of all property rights—the right to exclude others.

B. When a present occupant asserts his right to exclude police officers from his home, the government cannot overcome this assertion by relying on another occupant's purported consent. The shared social understandings that supported the Court's holding in *United States* v. *Matlock*, 415 U.S. 164 (1964), preclude that result. The social and legal understandings shared by members of our society do allow one occupant to invite a third party into his home in the absence of objecting cotenants. The holding in *Matlock* reflects those understandings. But it is similarly understood that strangers may not enter the home based on the putative consent of one occupant when another is present and objects to the entry. No person on the doorstep of the home, invited to enter by one inhabitant but confronted with vociferous objection from another, would think it permissible to brush the objecting occupant aside and enter nonetheless. The same rule should apply to the police.

To the extent relevant, that rule finds expression in principles of property law. While one tenant may, absent

objection, invite outsiders onto land, he may not do so when that interferes with the rights and quiet enjoyment of other tenants, such as where they are present and object to the intrusion. None of the cases cited by petitioner and its *amici* license a stranger standing at the threshold of a home to push his way inside past a present and objecting occupant at the invitation of another—much less push his way past the objecting tenant into the objector's bedroom.

The prohibition on entry over a tenant's objection serves important societal interests. The contrary rule would increase the likelihood of violent confrontations and expose the objecting occupant to potential tort liability. It would, moreover, encourage the police to create or exacerbate marital discord by setting one spouse against the other, a result that is in serious tension with the sanctity and respect our society accords the marital relationship.

Allowing the police to disregard the express wishes of an individual from whom they have sought consent, moreover, is inconsistent with basic principles of self-determination and the rule of law. This Court has explained that the citizen's decision to consent to a search is entitled to dignity and respect. By the same token, the decision not to consent is entitled to equal dignity and respect. When the police ignore a citizen's wishes after having purported to seek consent, they send a message of disrespect for individual constitutional choice.

C. The law enforcement need in this context is particularly slight. Where there is probable cause, the police can get a warrant. This Court, moreover, has recognized that the police may enter a home over a citizen's wishes without a warrant when there are exigent circumstances, and that the police may take reasonable measures to prevent the destruction of evidence, if they have sufficient reason to believe such destruction is

imminent, while officers obtain a warrant. Consequently, the only circumstance under which the police would "need" to rely on the rule advanced by petitioner is when there is no probable cause to believe a crime has been committed, no exigency exists, and there is no reason to fear the imminent destruction of evidence. But that is precisely the circumstance in which the law enforcement interest in entering the home is at its nadir. In such a case, it is unjustifiable and unreasonable to sacrifice an individual's right to privacy (and society's corresponding interests in preventing violent confrontation) to law enforcement expediency.

D. Finally, the record evidence in this case indicates that the occupant who purported to give consent—respondent's wife, Mrs. Randolph—had an interest in and relationship to the home (and the bedroom in particular) that was inferior to respondent's. Indeed, she had all but abandoned the home a month earlier, separating from respondent. In general, the consent of one with a subordinate interest in property cannot override the express wishes of a present occupant with a superior interest. Moreover, the record reflects that the bedroom at issue was known to the police as "Mr. Randolph's bedroom," not the couple's bedroom. Under this Court's precedents, one tenant cannot consent to the search of an area reserved for *another's* use and over which she does not share common authority and control.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PERMIT GOVERNMENT AGENTS TO PRESS THEIR WAY INTO PRIVATE HOMES AND BEDROOMS, PAST A PRESENT AND OBJECTING OCCUPANT, WITHOUT A WARRANT OR EXIGENCY

This case concerns whether the police must respect a citizen's decision to exercise his right to exclude them from the most private of locations—his home and, in particular, his bedroom. When the police asked respondent for consent to search his home and bedroom, respondent unequivocally refused, denying the police permission to enter without a warrant. The police did not respond by seeking a warrant or asserting exigent circumstances. Nor, however, did they respect respondent's decision to exercise his right to refuse admission to the police. Instead, they sought to circumvent respondent's choice by asking for and obtaining consent from respondent's wife (from whom respondent was separated). They did so even though respondent was present and expressly objecting to entry. They did so even though respondent's wife's connection to the home had become attenuated. She and respondent had separated; she had abandoned the marital home and relocated to Canada a month before; and she had returned for only a few days to collect more of her belongings. Yet, based on her putative consent, the police entered respondent's home and bedroom over his protest.

The police effort to bypass a present citizen's express and lawful effort to assert the privacy and sanctity of his home is inconsistent with the Fourth Amendment's irreducible requirement that searches be "reasonable." No ordinary citizen at the threshold of another's home or bedroom would ever claim the right—or believe that he is privileged—to push his way inside, past a present and

objecting occupant, based on the putative consent of another. To the contrary, the "understandings that are recognized and permitted by society," as well as those reflected in "concepts of real or personal property law," *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143-44 (1978)), strictly prohibit entry under such circumstances. That prohibition and the important societal interests it protects apply with no less force when the person seeking entry is no ordinary stranger but the government.

The police refusal to accept respondent's decision to deny consent, moreover, is inconsistent with the principles of individual responsibility and self-determination that undergird the concept of consent generally. As this Court has observed:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding.

United States v. *Drayton*, 536 U.S. 194, 207 (2002).

In a society based on law, the decision not to consent, and words like "no" and "do not," are likewise entitled to a weight and dignity of their own. Police officers "act in full accordance with the law" when they ask for consent. But they undermine the rule of law, they denigrate the principle of self-determination, and they send the message that individual constitutional choice is a charade when, having been advised of the citizen's wishes, they proceed to ignore them without resort to the legal procedures (*e.g.*, a warrant) that ordinarily serve as a bulwark of individual liberty. That result and the concomitant message of disrespect for individual constitutional choice should not be endorsed.

A. The Right To Exclude And Corresponding Privacy Interests Are At Their Apogee In The Marital Home

Whether a warrantless search offends the Fourth Amendment depends first on "whether a person has a 'constitutionally protected reasonable expectation of privacy'" in the location at issue. *California* v. *Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Even where a defendant has a "subjective" expectation of "privacy in the place searched," that expectation must be "reasonable," *i.e.*, "one that has a 'source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Carter*, 525 U.S. at 88 (quoting *Rakas*, 439 U.S. at 143-44).

Nowhere are expectations of privacy more likely to be reasonable—and more closely guarded by custom and law—than in the home, particularly where a citizen expressly objects to the intrusion on "the sanctity of [his] home and the privacies of life." *Boyd* v. *United States*, 116 U.S. 616, 630 (1886). "[A] special benefit of the privacy all citizens enjoy within their own walls * * * is an ability to avoid intrusions." *Frisby* v. *Schultz*, 487 U.S. 474, 484-85 (1988). "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970).

The special solicitude the law affords the privacy and security of the home reflects both principles of private property and the home's important function in our society. One of the keystones of private property is the right to exclude others. "[T]he owner's right to exclude

others from entering and using her property [is] perhaps the most fundamental of all property interests," *Lingle* v. *Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2082 (2005)—"'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)). Indeed, "physical entry of the home" is the "chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States Dist. Court for E.D. Mich.*, 407 U.S. 297, 313 (1972). The right to exclude, moreover, is the primary characteristic that sets private property apart from the commons. The right to invite entry is shared by both the property owner standing on his private land and the common citizen standing on public land. But the right to exclude others is unique to the owner of private property.

The home, moreover, has long served as a unique refuge from the insecurity and public scrutiny of the commons. "The axiom that a man's home is his castle * * * has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition." *Carter*, 525 U.S. at 100 (Kennedy, J., concurring) (citation omitted). It is not only a place to sleep and be "at our most vulnerable"; it is also a place to entertain visitors and host overnight guests, who "seek[] shelter in another's home precisely because it provides [them] with privacy." *Minnesota* v. *Olson*, 495 U.S. 91, 99 (1990).

The special status of the home is of particular importance when the government seeks to intrude on the privacy of a marital household. Just as the walls of the home shield individual private matters from outside intrusion, so too they provide a bulwark against intrusion on the intimacies and confidences of marital life. The

importance of barring intrusion on those interests is repeatedly reflected in law. For example, even setting aside the Framing-era rule that one spouse may never testify against the other as to any matter, it is now well-settled that one spouse may not testify as to confidential marital communications if the other spouse objects. See 3 Joseph M. McLaughlin, *et al.*, *Weinstein's Federal Evidence* § 505.09, at 505-15 (2d ed. 2005); *e.g.*, *United States* v. *Wood*, 924 F.2d 399, 401-02 (1st Cir. 1991).[2] The intimacy of the marital household and bedroom must be accorded similar solicitude when threatened with physical and not mere testimonial invasion. Cf. *Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

B. The Police May Not Invade The Home Based On The Putative Consent Of A Co-Occupant Over The Express Objection Of The Other, Present, Co-Occupant

Neither petitioner nor its *amici* dispute that respondent enjoyed a reasonable expectation of privacy—a

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[2] For at least 150 years after the Constitution's framing, this Court followed the "general rule that neither a husband nor wife can be witness for or against the other," *i.e.*, spouses were held incompetent to testify against one another even if no marital communications would be disclosed. *Stein* v. *Bowman*, 38 U.S. (1 Pet.) 209, 210 (1839). In *Hawkins* v. *United States*, 358 U.S. 74, 77-78 (1958), the Court rejected the notion of competency as anachronistic and instead relied on a privilege doctrine, holding that either spouse may object and thereby foreclose the testimony of the other. Most recently, in *Trammel* v. *United States*, 445 U.S. 40, 53 (1980), the Court concluded that mutual consent is no longer required and that, except for marital communications, a spouse may voluntarily testify against the other spouse, but cannot be compelled to do so.

legitimate and socially recognized expectation—in his own home. Nor does anyone claim that respondent himself "waived" or otherwise "consented" to an intrusion on his Fourth Amendment rights or interests. The only question is whether the consent of a third person—respondent's wife—is sufficient to overcome his rights despite his presence and continued objection to physical entry into his home and bedroom. Custom, the law, and the societal interests they reflect all demonstrate that the answer is "no."

1. *Shared Social Understandings Support* Matlock*'s Conclusion That One Occupant May Allow Entry In The Other's Absence*

This Court has already concluded that one cotenant may, in the other's *absence*, consent to a search of the premises. As this Court explained in *United States* v. *Matlock*, 415 U.S. 164, 170 (1974), "the consent of one who possesses common authority over premises or effects is valid as against the *absent* nonconsenting person with whom that authority is shared." That rule reflects social custom, common experience, and (to the extent relevant) principles of property law.

a. As a matter of custom and experience, members of our society generally understand that an invitation from one cotenant to enter the premises is valid and effective notwithstanding the absence or silence of other cotenants. No one invited to enter a home by one of its occupants would think twice about entering without separate or express consent from the other occupants. The social guest invited by one spouse to come inside for a cup of tea; the business visitor invited to pitch his wares; the teenager invited inside by his highschool classmate. Each of these individuals would understand that—absent some contrary indication—an invitation

from one of the home's inhabitants is no less valid than an invitation from all.

b. That understanding finds expression in principles of real property law as well. As a general matter, cotenants may bring guests onto the premises (at least absent objection from, or interference with the quiet enjoyment of, other tenants). The law properly assumes that, if one tenant issues an invitation, his cotenants have no objection. See pp. 23-24, *infra*; cf. *United States* v. *Stone*, 471 F.2d 170, 177 (7th Cir. 1972) (Swygert, J., dissenting) ("Basic to the third party consent rationale is the premise that the absent party might, were he present, consent to the search, in which event no constitutional rights would be violated."). In that sense, the ordinary cotenancy relationship includes permission to bring others into the abode. Contrast *Stoner* v. *California*, 376 U.S. 483, 489 (1964) (while hotel guest impliedly consents to entry by "maids, janitors, and repairmen" in "the performance of their duties," that consent does not extend to the night clerk or the police).

As a result, one who shares his home with others, gives them "joint access or control for most purposes," and leaves them in sole possession unattended, "assume[s] the risk that one of their number might permit the common area to be searched" in his absence. *Matlock*, 415 U.S. at 172 n.7. In the context of chattels, for example, this Court has concluded that a defendant who not only allowed his cousin to use his duffel bag, but also left the bag at his cousin's house, "must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969). That conclusion is fully consistent with the understandings that members of society share when multiple individuals inhabit a single home.

2. *Shared Social Understandings Preclude Extending* Matlock *To Permit Entry Despite Objection By A Present Occupant*

The social understandings and legal rules that support the result in *Matlock*, however, point in precisely the opposite direction in this case. As a matter of social custom and shared understanding, no person on the doorstep of the home, invited to enter by one inhabitant but confronted with objection from another, would think it permissible to brush the objecting occupant aside and enter nonetheless. Whether the potential visitor appears for social or business purposes, the social custom is clear—the objection of one cotenant renders the invitation of the other ineffective. That is particularly true when the invitee stands not on the threshold of the home but on the threshold of a private bedroom.

Consistent with that understanding, concurrent ownership or possession also creates a concurrent right to exclude.[3] One cotenant has no right to exclude the other cotenants—each has an equal right to full use and enjoyment of the premises. But no cotenant may use the property to interfere with the quiet enjoyment of the others either. 7 *Powell on Real Property* § 50.03[1] (Michael Allen Wolf, ed., 2005) ("Each cotenant * * * has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in

[3] 7 *Powell on Real Property* § 50.06[1] ("In actions against outsiders to try title, or for ejectment, or for possession, the individual tenant in common may generally sue alone, with the outcome applicable to all cotenants"); *id.* § 52.03[4] ("Each tenant by the entirety is entitled to * * * protect it against outsiders * * * ."); 4 *Thompson on Real Property* § 31.07(d) (David A. Thomas, ed., 2004) ("Because each joint tenant is entitled to possession of the whole, each is enabled to defend the estate against strangers. Title may be vindicated and trespassers removed from any part by an action of ejectment brought by any joint tenant.").

the other cotenants."). That limit on each tenant's use forecloses tenants from bringing unwanted visitors onto the property when objecting cotenants are present. As one treatise observes:

> A license * * * to a stranger, if availed of by the licensee, does involve an interference with the possession of the others, and the licensee can, it would seem, justify his entry only on the theory that the licensor had authority to act on behalf of the others in granting such a license. In so far as the license involves a permission merely to enter on the land * * * an authority in one cotenant to grant such a license in behalf of all might well be inferred, but if one cotenant has implied authority to grant the license, any other cotenant should have implied authority to revoke it, the effect of which would be that *the license is valid only until one of the cotenants expresses his dissent.*

2 Herbert Thorndike Tiffany & Basil Jones, *The Law of Real Property* § 457, at 274-75 (3d ed. 1939) (emphasis added); see also Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47, 63 (1974-75) ("[O]rdinarily, persons with equal 'rights' in a place would accommodate each other by not admitting persons over another's objection while he was present.").

Early cases reflect the same principle—even when dealing with contexts other than the home. In *Richey* v. *Brown*, 58 Mich. 435, 435 (1885), for example, a mother, son, and daughter owned and resided on a farm as tenants in common. The defendant, a resident of a neighboring farm, sought consent from the son to enter onto the land and cut timber, without seeking permission from the mother or daughter. *Id.* at 436. As soon as the mother and daughter learned of the defendant's doings on the premises, the mother notified the defendant to "keep off the land." *Ibid.* Responding to a trespass

action, the defendant argued that he had received a license from the son. The court held that, without valid authority from the mother and sister, the son could not "give a valid assent to the entry of the defendant upon the premises for any such unlawful purpose." *Ibid.* See also *Moore* v. *Moore*, 34 P. 90, 92 (Cal. 1893) (affirming that one tenant-in-common's "bare license" to "enter, occupy and cultivate" the land is not a defense to a suit for ejectment, as "'no action of a portion of several tenants in common can impair the right of their cotenants'" (quoting *Mahoney* v. *Van Winkle*, 21 Cal. 552, 553 (1863))).

Those cases, which deal with land, should make cases like this one, which concern entry into the *home* over the objection of a present cotenant, an *a fortiori* conclusion. Just as one tenant cannot license strangers to enter and use land to the detriment of the right of quiet enjoyment of his cotenants, one tenant cannot license guests to enter and destroy his cotenants' quiet enjoyment of the home over their objection. As explained below, that is particularly true in the context of marital tenancies. See pp. 21-22, *infra*.

3. *The Rule Against Entry Over The Objection Of A Present Occupant Serves Important Societal Interests*

The rule that a stranger cannot enter a home over the objection of a present occupant serves numerous and important social values.

First is keeping the peace. Where there is a disagreement among cotenants about whether to permit a licensee to enter, the risk of violence is greatly diminished if the status quo is maintained with the putative licensee outside the home. As a Florida court observed, "such a rule is more likely to promote peace and tranquility. When one of two joint occupants consents to a search while the other is actively objecting, the

possibility of an untoward confrontation cannot be overlooked." *Lawton* v. *State*, 320 So. 2d 463, 465 (Fla. Dist. Ct. App. 1975). Faced with the potential for violent confrontation, social custom and the law adhere to the same principle: Where a co-equal inhabitant objects to entry, entry is generally proscribed.

Second, the entry of strangers into the home creates the potential for liability resulting from accidents or dangerous conditions in the home. The risk of liability is greater when the entrant is a licensee or invitee rather than a trespasser. See W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 58, at 393 (5th ed. 1984). Each cotenant who is present may be exposed to liability because of accidents on the property. As a result, each must be permitted to limit his liability by barring the entry of strangers.

Third, the principle of self-determination and adherence to the rule of law require the police to respect individual choice. Just like anyone else in our society, the police may seek voluntary consent to enter private property. Under our system of government, the decision whether to exclude—like many important and personal decisions—is generally placed in the hands of the individual rather than the government. When officers seek consent to enter, that reinforces the sovereignty of the individual over his personal property and private affairs. See Erik Luna, *Sovereignty and Suspicion*, 48 Duke L.J. 789, 841 (1999). It sends an appropriate message that, out of respect for individual sovereignty and choice, the police no less than anyone else may seek consent and arrive at an understanding that gives them license to enter private premises. See *Drayton*, 536 U.S. at 207.

Conversely, the police must respect the wishes of the individual even if, contrary to their desires, the individual withholds consent. (That excepts, of course, the consti-

tutionally provided alternative of seeking a warrant on probable cause.) For the police openly to circumvent an individual's express decision to refuse consent, without resort to the legal process of seeking a warrant, undermines the sovereignty of the individual over his property and the principle of individual choice. Moreover, it sends precisely the wrong message—that individual constitutional choice will be respected only when it suits the government's purposes.

Fourth, and finally, there are important social interests that arise where one deals with the *marital* household. (We set aside for the moment the various indications in the record that respondent's wife, by virtue of separating from respondent and relocating a thousand miles away in Canada, had abandoned her status as co-equal tenant and assumed the status of overnight guest—indications that, if considered by this Court, would compel affirmance. See pp. 28-30, *infra*.) As explained in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984): "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." This same interest in the highly private and sensitive marital relationship is also reflected in common-law principles, such as the privilege afforded confidential marital communications. See pp. 12-13, *supra*. In that context, neither spouse may testify to private communications over the other's objection. The same rule should apply here. If one spouse objects to the other's proposed intrusion into marital privacy, that objection should be sustained. Failure to object, of course, can result in forfeiture of the right, as in *Matlock* itself. But where the objection is made, it must be respected.

Property law, to the extent relevant, also reflects the special nature of the marital relationship. At common law, there were three predominant structures of concurrent ownership: tenancy in common, joint tenancy, and tenancy by the entirety. Tenancy in common, the most common form of concurrent ownership today, is characterized by separate fractional ownership by each tenant. *United States* v. *Craft*, 535 U.S. 274, 279-80 (2002). There are no restrictions on who may enter into a tenancy in common, and tenants in common may unilaterally alienate their own shares or place encumbrances upon those shares. *Ibid.* A joint tenancy is similar in many respects: There are no restrictions on who may enter into a joint tenancy, and each joint tenant enjoys certain rights in the property, including the right to exclude. *Ibid.* Unlike a tenancy in common, however, each joint tenant possesses the entire estate, rather than a fractional share, and a joint tenant also has a right of automatic inheritance known as "survivorship." *Ibid.* In order for one joint tenant to alienate his interest in the tenancy, the tenancy must be converted to a tenancy in common, though most States facilitate such alienation.

Tenancy by the entirety, in contrast, is a "unique sort of concurrent ownership that can only exist between married persons." *Craft*, 535 U.S. at 280-81 (citing 4 G. Thompson, *Real Property* § 33.02 (D. Thomas ed. 1994)). One of the chief characteristics of a tenancy by the entirety is that it cannot be severed unilaterally; nor can a tenant's interests be conveyed, leased, or transferred unilaterally. Instead, transfer typically requires the consent of *both* spouses or the ending of marriage in divorce. *Id* at 281. The ability of tenants by the entirety to introduce strangers to the household by alienating their interests is therefore more limited than in other contexts. Tenants in common can sell their interest and thereby inject strangers into the property unilaterally;

tenants by the entirety may not. 7 *Powell on Real Property* §§ 50.06[4], 52.03[4]. Following those same principles, many States also hold that neither spouse may encumber the marital property through separate debts. *Id.* § 52.03[3]; *e.g.*, *Beal Bank, SSB* v. *Almand & Assocs.*, 780 So. 2d 45, 53 (Fla. 2001) ("[W]hen property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse.").

Addressing the "typical" modern tenancy by the entirety, this Court has concluded that it accords each spouse an *individual* right to exclude. *Craft*, 535 U.S. at 282-83. Indeed, the Court relied on that as a basis for determining that the husband had a sufficient interest in an entireties property for it to be subject to a tax lien. *Id.* at 283 ("In determining whether respondent's husband possessed 'property' or 'rights to property' within the meaning of 26 U.S.C. § 6321, we look to the *individual rights* created by * * * state law rules. According to Michigan law, respondent's husband had * * * the following rights with respect to the entireties property: * * * the right to exclude third parties from it * * * .") (emphasis added). Advocating the same position, the United States observed that "[e]ach spouse has *separate rights* in the present use of the property," U.S. Br. at 13, *United States* v. *Craft*, 535 U.S. 274 (2002) (No. 00-1831) (emphasis added), and characterized the "right of *each spouse* 'to exclude others' from property held in a tenancy by the entirety" as "'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" *id.* at 14 (quoting *Dolan*, 512 U.S. at 384) (emphasis added).

This Court, of course, has rejected the view that the boundaries of lawful police conduct should be set by

reference to hoary rules of real property. *Matlock*, 415 U.S. at 172 n.7. One could hardly expect an officer on the scene to make fine distinctions among tenants in common, joint tenants, and tenants by the entirety. But constitutional limits on police invasions into personal privacy are informed by the understandings society shares and respects as legitimate, and property law often reflects those principles. Here, there can be little dispute that a stranger at the door is not licensed to push his way into the house past an objecting cotenant, much less press his way into the marital bedroom past an objecting spouse, merely because another purports to consent. The same rule should apply to the police.

4. *The Property Cases Cited By Petitioner And Its* Amici *Do Not Support A Contrary Rule*

Respondent and its *amici* cannot seriously contest the social custom and shared understanding described above. Nowhere do they identify a social understanding that strangers may push their way into the marital abode past a present and objecting spouse at the putative invitation of the other. Perhaps recognizing that defect, the United States argues (in a footnote) that real property principles in fact privilege individual cotenants to insert strangers into the household over the objection of present and objecting cotenants. U.S. Br. at 16 n.4.

The argument is not well founded. The cases and cited authorities stand for a much more limited (and less controversial) proposition. First, for the most part, they address the situation where one "tenant in common" invites a guest or business visitor onto the property with the acquiescence of or in the absence of another tenant. See *Granger* v. *Postal Tele. Co.*, 50 S.E. 193 (S.C. 1905) (where one tenant in common granted permission to defendant company to construct and maintain telegraph lines on the property with the knowledge and consent of

the plaintiff cotenant, there is no trespass); *Dinsmore* v. *Renfroe*, 225 P. 886 (Cal. Ct. App. 1924) (plaintiffs, tenants in common, not present and objecting to the entry of a stranger). Those cases may recognize the ability of cotenants to authorize entry despite "non-consenting cotenants," 86 C.J.S., Tenancy in Common § 135, at 391 (1997), but even that rule is far from uniformly accepted, *ibid.* ("some authority" holds that "a tenant in common cannot license a third person to enter * * * as against the rights of non-assenting cotenants"); pp. 16-17, *supra*. In any event, those authorities merely address "nonconsenting tenants," *i.e.*, cases where the consent of another cotenant was not obtained before entry. They do not address cases where, as here, the other cotenant is present and expressly *objects* to entry because it will interfere with his quiet enjoyment. The rule for express objections is very different: A license to enter is "valid only until one of the cotenants expresses his dissent." 2 Tiffany & Jones, *supra*, § 457, at 275.

Other cases support the corresponding rule that, once an invitee has entered with valid permission, he cannot be converted into a trespasser and forcibly ousted by a late-arriving cotenant. See *Causee* v. *Anders*, 20 N.C. 388 (1839); *Buchanan* v. *Jencks*, 96 A. 307 (R.I. 1916); see also 86 C.J.S., *supra*, at 391. That too is consistent with social understandings and the dominant societal interest in maintaining the peace. One who enters a home with consent surely does not do so with the expectation that he will be assaulted (as in *Causee*) if another tenant arrives later and objects to the invitation. Nor does one who enters under license expect to become the defendant in a trespass action for damages merely because late-arriving tenants disagree with the first tenant's decision to admit him (as in *Jencks*).

But that hardly suggests that an invitee can enter into the home in the first place when another cotenant is present and objecting to entry. None of the cases or treatises cited by the United States articulate *that* rule; they at best address the circumstance of a non-assenting tenant who raises objections after the fact. Where a cotenant is present and objects to entry, the cases generally favor—consistent with the strong interest in avoiding violent confrontation—preserving the status quo and disallowing self-help to alter the situation. When a cotenant is present and objecting, the visitor is not permitted to push his way inside past the objector, since such entry may create confrontation. Conversely, when the visitor has already entered the premises, his "license" may be withdrawn, but the dissenting cotenant cannot engage in self-help to eject the visitor forcibly, as that too could create the potential for undesirable confrontation.

Finally, the cases cited by the United States all involve tenants in common, not marital cotenants, and most involve entry onto land rather than into the home. Where the occupants are involved in the more intimate marital relationship, the law is more protective of their privacy and interests in the home. See pp. 21-23, *supra*. It is, moreover, inconsistent with the respect society accords the marital relationship for police to create or exploit fissures in the marital bond by pitting spouses against each other, seeking one spouse's consent to overturn the other's refusal. This Court ought not adopt a rule that encourages such tactics.

C. The Law Enforcement Interest Is Dwarfed By The Corresponding Intrusion On Privacy, Safety, And Other Societal Values

There can be no dispute that consent searches, as a general matter, serve important law enforcement interests. But that interest is certainly not so great that it counsels in favor of extending the doctrine to validate searches where the police ask the defendant for consent

and consent is withheld. Indeed, extending the concept of consent that far would aid law enforcement only in those cases where the interest in intruding on personal privacy is particularly slight—where there is no probable cause to suspect a crime and no exigency.

Where the police have a genuine need to enter the home against the citizen's wishes, the system established by the Framers, as well as this Court's cases, provide a mechanism to accommodate that need. Where the officers have probable cause, they may seek a warrant and enter the home. Indeed, when it comes to entering the home, there is a strong presumption in favor of requiring officers to obtain a warrant issued on probable cause by a neutral, detached judicial officer. *Payton* v. *New York*, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477-78 (1971))). Where there are exigent circumstances such as hot pursuit, the police may dispense with the warrant requirement and pursue the fleeing suspect into the home. *Warden, Md. Penitentiary* v. *Hayden*, 387 U.S. 294, 298 (1967). And where the police fear that an individual—tipped off to their presence by the request for consent or some other event—may destroy evidence while they obtain a warrant, the police may briefly detain that individual outside the home to prevent such destruction while the warrant is being obtained. *Illinois* v. *McArthur*, 531 U.S. 326, 333 (2001).

For that reason, petitioner (Br. at 17) errs in asserting that the rule set forth by the Supreme Court of Georgia would "thwart the ability of law enforcement officials to locate and seize evidence of a crime before evidence is destroyed." This Court's decisions already address that circumstance. Where there is sufficient reason to believe

contraband is present, the officers can obtain a warrant. And where there is sufficient reason to fear the evidence's destruction before a warrant can be obtained, as in *McArthur*, *supra*, the police may act reasonably to prevent the destruction.

Indeed, there appears to be only one circumstance in which this Court's cases would frustrate entry—where the police cannot obtain a warrant issued on probable cause and they lack sufficient grounds to seek warrantless entry by reason of exigent circumstance. But in that circumstance—where the police do not have sufficient grounds for believing that a crime is being committed, and no exigency exists—the law enforcement interest in entering the home is virtually nonexistent. The police may have a sufficient interest to ask for consent to search. But they do not have a sufficient interest to warrant disregarding the citizen's decision to refuse that consent. That is particularly true where, as here, the police seek to enter the most private of locations, the home (and within it the bedroom). The sanctity of the home protected by the Fourth Amendment, the dominion our society affords citizens over their property, and the principle of self-determination implicit in the concept of consent should not be sacrificed for what amounts to the scantest of law enforcement needs.

It therefore comes as no surprise that the leading legal commentators have almost uniformly reached the same conclusion as the Supreme Court of Georgia in this case. "When two or more persons have equal use of a place in which both are present, the consent of one does not normally eliminate the need for the consent of the other(s) before a search is made." Weinreb, 42 U. Chi. L. Rev. at 63; 4 Wayne R. LaFave, *Search and Seizure* § 8.3(d), at 159 (4th ed. 2004) (Requiring the consent of both occupants has "somewhat greater appeal" because "the risk assumed by joint occupancy is merely an

inability to control access to the premises during one's absence."); see also 4 *Thompson on Real Property* § 31.07(d), at 51 (David A. Thomas, ed., 2004) ("The consent [of one joint tenant to a police search] is generally not valid to permit a search if another joint tenant, present at the same time, objects."). That conclusion is mandated by the social understandings that society accepts as legitimate. It is reflected in principles of real property law. It is supported by basic principles of self-determination. And it is compelled by any sensible balancing between individual liberty and law enforcement need.

D. The Record Indicates That Mrs. Randolph's Connection To The Property Was Insufficient To Elevate Her Decision Over Respondent's

Finally, petitioner overlooks two other factors rendering the search unreasonable in this case: Mrs. Randoph's attenuated relationship to the home, and evidence that—whatever Mrs. Randolph's relationship to the home generally—the bedroom searched was not an area under her common control.

1. While the Georgia Supreme Court resolved this case under the assumption that Mrs. Randolph and her husband had equal rights and control over the home, Pet. App. 1, the record indicates that such was not the case—and that the police knew that. As explained above, Mrs. Randolph had separated from her husband and moved hundreds of miles away, with her son and many of her belongings, about a month before the search took place. She had, moreover, recently returned for only a couple days for the apparently limited purpose of collecting additional belongings. See pp. 2-3, *supra*. Given her separation from her husband, her abandonment of the home, and the limited purpose of her return, Mrs. Randolph was more akin to an overnight guest than a co-

equal tenant, and her interest in the property was therefore inferior to that of the home's principal occupant, respondent.

It is well established that the consent of a mere visitor is ineffective over the objection of the home's primary occupant. As a leading treatise explains, objection by a present person with a superior interest trumps a consent given by a person with an inferior interest. See 4 LaFave, *supra*, § 8.3(d), at 160 ("[A]n objection by the person with the superior interest would prevail over a consent given by a person with a lesser interest.") (citing cases); *Lucero* v. *Donovan*, 354 F.2d 16, 20-21 (9th Cir. 1966) (holding that police search was unlawful where a "welcome visitor" consented to a warrantless search over a resident's protest and demand for a warrant). Here, the police knew facts that, at the very least, cast doubt on the extent of Mrs. Randolph's interest in the property. 10/2/03 Tr. at 14-15.

This case, in any event, is utterly unlike *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). The police here did not merely make a mistake of fact regarding whether someone was a cotenant (much less a mistake based on misrepresentations by the person purporting to give consent). Instead, the police willfully chose to ignore respondent's express and unequivocal decision to refuse consent and to seek consent from another person instead. Because the Fourth Amendment proscribes that effort to bypass respondent's decision, because it offends the social understandings we all share, and because it undermines important social values (including respect for individual sovereignty and maintaining the domestic peace), that tactic cannot be upheld.

2. Petitioner's position is defective for a second reason. It is well established that a third party cannot validly consent to the search of an area over which he has no common control, even if that area is within shared

premises. 4 LaFave, *supra*, § 8.3(e), at 167. In *Matlock*, for example, this Court focused on whether the occupant's "relationship to the east bedroom" was sufficient to afford him authority to give valid consent to a search of that room. 415 U.S. at 167. The question thus was not whether the occupant had control over the entire house in general, but whether there was "common authority," "mutual use," or "joint access or control" over the specific location in question. *Id.* at 171 & n.7. Here, the record evidence indicates that the bedroom where the police found the straw and white residue was known to the officer as "Mr. Randolph's bedroom," not the couple's bedroom. Because it has not been established that Mrs. Randolph had common control over the bedroom, her consent cannot validate the search.

CONCLUSION

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted.

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In The Supreme Court of the United States

STATE OF GEORGIA,

Petitioner,

v.

SCOTT FITZ RANDOLPH,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

"[T]he search of property, without warrant and without probable cause, but with proper consent, is valid under the Fourth Amendment." *United States v. Matlock*, 415 U.S. 164, 165-66 (1974). Proper consent may be obtained "either from the individual whose property is searched . . . , or from a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

The Georgia Supreme Court held that consent of one co-occupant to search a shared premises was valid only when the other occupant was absent, viewing the assumed risk that one co-occupant would permit police to search common areas as nothing more than an inability to control access to the premises during the other's absence. (Pet.App. 1, 3). The Court held that if the other occupant was present and able to object, police must obtain the other's consent as well. *Id.*

Respondent does not argue that the Georgia Supreme Court's view should be adopted or even defend that Court's position that police must obtain consent from all present co-occupants. Rather, Respondent would have this Court look solely to whether the consenter's co-occupant affirmatively objects and, if so, police may not enter the premises although an occupant with equal authority and control over the premises has given them permission to enter. In short, Respondent would have this Court adopt a rule which extinguishes the ability of a co-occupant with actual and equal authority over a shared premises to permit inspection of the common areas of that premises in her own right. Such a position cannot be reconciled with this

Court's decisions and general Fourth Amendment principles.

A. Respondent's "Voluntary Relinquishment" Theory Cannot Be Reconciled with This Court's Decisions Validating Third Party Consent Searches.

Consent searches are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Consent must be freely and voluntarily given, with voluntariness being a question of fact to be determined from the totality of circumstances, and the Constitution does not require that the person giving consent knows that he or she has a right to refuse consent. *Id.* at 222-23, 248-49.

Based on the recognized utility and value of consent searches, in *Matlock* this Court reaffirmed that police are not limited to obtaining consent from only the suspect himself in order to enter and search the residence the suspect shares with another. Officers may validly act upon voluntary consent from the suspect's co-occupant if the latter has "common authority" over the premises, an authority derived not from property law but from "mutual use of the property by persons generally having joint access or control for most purposes. . . ." *Id.* at 171 n.7. From that mutual use, "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id. Rodriguez* reaffirmed that principle and held that a warrantless entry is valid when based upon consent of a third party whom police reasonably believed, at the time of entry, had common

authority over the premises but who in fact did not. 497 U.S. at 179.

Respondent would limit *Matlock*'s rule of third party consent to his novel theory of "voluntary relinquishment" of control of the premises to other co-occupants, a "relinquishment" that purportedly occurs when the suspect is either absent from the premises or is present but does not affirmatively object before police enter to search based on permission from a co-occupant. Such a theory is belied by the facts of both *Matlock* and *Rodriguez*, as neither defendant "voluntarily relinquished" control of the premises: Matlock was arrested in the front yard and put in a police car while police asked the woman with whom he was living for consent, while Rodriguez was known to be asleep in the apartment when police entered with the consent of a woman whom police thought lived there. *Matlock*, 415 U.S. at 166; *Rodriguez*, 497 U.S. at 179. Neither defendant can fairly be said to have "voluntarily relinquished" control of the premises to other co-occupants.

Matlock validated a search based solely upon consent of the suspect's co-occupant, without any analysis of whether the suspect should have been asked to consent or had relinquished control of the premises. Rodriguez made clear that one element that can make the search of a person's "reasonable" is "the consent of the person or his cotenant." 497 U.S. at 183-84. In light of these holdings, it would be anomalous to conclude that the consent of a co-occupant, with equal access to and authority over a premises, becomes "unreasonable" under Fourth Amendment principles merely because the suspect or target of the search refuses consent.

The consenter's authority over the premises does not wax or wane simply because other occupants are present, as "the relevant analysis focuses on the relationship between the consenter and the property searched, not the relationship between the consenter and the defendant." *United States v. McAlpine*, 919 F.2d 1461, 1464 (10th Cir. 1990). In particular, the authority of a "third party" such as Mrs. Randolph over their marital home did not increase or lessen with Randolph's presence, as her mutual use of the property and her access over the common areas remained the same, regardless of where he was. As the trial court found, she had "common authority to grant consent for police to search the marital home" and was "fully competent" to grant consent to search. (J.A. 23).

B. Respondent's Expectations of "Absolute Control" Over Shared Premises Are Unreasonable.

The flaw in Respondent's "voluntarily relinquishment" theory is that it assumes that when the defendant or suspect is at home, he is in total control of the premises and all other occupants always accede to his wishes. Under his "voluntary relinquishment" theory, the other co-occupants' rights in and authority over the shared premises are only triggered when he is away or, if he is present, he does not object to a search. Such expectations of absolute control over shared property are not "reasonable" and should not be enshrined in the Fourth Amendment.

Rodriguez, *Matlock* and *Frazier v. Cupp*, 394 U.S. 731, 740 (1969), all recognize the reduced expectations of privacy in property shared with another and that those reduced expectations reasonably include the risk that a co-occupant will allow someone to enter the premises, even if

the defendant does not consent. "Although there is always the fond hope that a co-occupant will follow one's known wishes, the risks remain." *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995).

Police have long been allowed to proceed on the basis of "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Police may reasonably assume that a husband and wife mutually use the common areas of their home and have joint access to them. *United States v. Whitfield*, 939 F.2d 1071, 1074 (D.C. Cir. 1991).

Respondent would have this Court hold, however, that is unreasonable for police to ask for consent to search from a co-occupant such as the wife if her husband has refused consent. While Respondent mischaracterizes Petitioner's position as giving a wife such as Mrs. Randolph "superior" rights or control over the couple's marital home, it is Respondent who is asserting a position that would give him total control over a shared residence, notwithstanding his wife's desire to admit police into their shared residence. Respondent's position is nothing more than a thinly-veiled call for a return to the day when the man was *the* king of the castle and no one else in the home had any rights or legal standing.

C. "Common Authority" Is Measured by an Objective Standard.

Respondent also mischaracterizes Petitioner's position as asserting that anyone with "common authority" over the premises, including minor children or landlords, could give police valid consent. In actuality, it is with *Matlock*'s

definition of "common authority" that Respondent takes issue, as Petitioner's position is based squarely on *Matlock* and *Matlock* established that the authority which justifies third party consent rests on "mutual use of the property by having joint access or control for most purposes. . . ." *Matlock*, 415 U.S. at 171 n.7.

Both *Rodriguez*, 475 U.S. at 188, and *Stoner v. California*, 376 U.S. 483 (1964), made clear that police may not always accept each person's invitation to enter a premises. Instead, an invitation to enter must be analyzed under an objective standard to determine if the facts available to the officer at the moment would warrant a reasonable man to believe the consenting party had authority over the premises. *Rodriguez*, 497 U.S. at 188 (cits. and quotes omitted). If the situation appears ambiguous, police have a duty to make further inquiry.[1] *Rodriguez*, 497 U.S. at 188-89; *United States v. Whitfield*, 939 F.2d at 1075. Respondent errs in relying on *Stoner* and *Chapman v. United States*, 365 U.S. 610 (1961): the Court refused to give effect to the consent given by the respective hotel clerk and landlord because they lacked "common authority" over the premises for purposes of triggering the *Matlock* rule.

One who has equal access to and control over a premises should be able to give police permission to search that premises in his or her own right if that permission is

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[1] In a situation involving a minor child, additional factors such as the minor's age, address, right of access and right of invitation could be ascertained in order to establish the minor's relationship to the premises and show whether the minor has "common authority," to give valid consent to search. *See, e.g., Brooks v. State*, 262 Ga. 578, 580(1), 422 S.E.2d 546 (1992). The need for and content of such additional inquiry to minors are not questions raised or decided below.

voluntary. The occupant giving consent is not waiving any one else's rights, as Respondent asserts, but is simply granting access to search the areas she shares with others.

D. Common Law Did Not Permit a Co-Tenant to Exclude the Guest of Another Co-Tenant.

To the extent that Respondent and his Amicus rely on property and common law concepts to assert that Respondent's objection to the search trumps his wife's consent, such reliance is misplaced. Under property concepts, "co-tenants are entitled to full enjoyment of the joint property, and are not allowed to exclude the other co-tenants from it." *Morning*, 64 F.3d at 536 n.6. In addition, each co-tenant could license his or her rights in the property to a third party, and the third party could use the property to the same extent as the party who gave the license. *See, e.g., Rawson v. Morse*, 21 Mass. 127, 133-34 (1826); 62 C.J. *Tenancy in Common* § 222(3) (1933). One co-tenant therefore could not exclude a third party who had been licensed by another co-tenant. *See* 86 C.J.S. *Tenancy in Common* § 135 (1997); 62 C.J. *Tenancy in Common* § 222; *McGarrell v. Murphy*, 1 Hilt. 132 (N.Y.Ct.Comm.Pl. 1856). Because one co-tenant had no right to – and was not permitted to – exclude a third party who entered the premises with authority from another co-tenant, it necessarily follows that a co-tenant's objection to an entry made no difference under the common law.

The case relied on by Respondent's Amicus, *Richey v. Brown*, 568 Mich. 435 (1885), (NACDL Br. 17-18), involved consent given to the third party by a minor; when the minor's mother thereafter learned of the invitation and notified the third party not to enter the premises, the

court held that the third party was barred from continuing to enter the premises with the unlawful purpose of taking timber without paying for it. This decision is easily reconciled with *Matlock* as, cutting through the labels, the minor did not have sufficient authority over the premises to give valid consent.[2]

E. Consent Searches Authorized by Occupants with Equal Access and Control Over Shared Premises Serve Valid Societal Interests.

The overriding consideration that Respondent overlooks in this case is that Mrs. Randolph was trying to report a crime occurring in her house. Police did not create the controversy by simply appearing at the door and asking for general consent to search the couple's residence. She had called police to the residence after her husband absconded with their child and, in the course of relaying events, told police about her husband's drug use. (Pet.App. 7-8). She cooperated with police and led them upstairs to the bedroom where the cut straw with its white residue was in plain view on a dresser. (Pet.App. 8).[3]

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[2] Respondent's Amicus relies on a sentence from a treatise (NACDL Br. 17), but that sentence by its own terms reflects the treatise author's view of what the rule should be rather than what it was, and the treatise does not cite decisions or authority supporting that view.

[3] Respondent never argued at the suppression hearing that his wife did not have sufficient authority over the bedroom to give consent to enter, nor was this factual question presented to or decided by any Georgia court. As noted, the trial court found she had "common authority to grant consent for police to search the marital home." (J.A. 23). The question presented to the Georgia Supreme Court was the "situation in which two persons have equal use and control of the premises to be searched." (Pet.App. 1). Respondent never objected to the

(Continued on following page)

Under the rule proposed by Respondent, one occupant of a residence would not be able to cooperate with police by consenting to a search that would reveal criminal activity conducted in her home by another occupant. Instead, the other occupant's refusal to search would automatically trump her own consent and extinguish her ability to exercise dominion and control over her own house. This was not simply Randolph's house. This was their house. Respondent's asserted interests in promoting marital harmony, in preferring that police seek a warrant, and in how a co-occupant could supply evidence for a warrant were all equally at play in *Matlock*. In short, Respondent's arguments are against the result reached in *Matlock* itself.

Schneckloth discussed at length the salutary effects of consent searches, noting that they are valuable in situations where police have some evidence of illicit activity but do not have probable cause to arrest or search, so that this may be the only means by which to obtain reliable and important evidence; and that even when police have probable cause, consent searches may be more convenient and, if fruitless, lead police to conclude that an arrest is not necessary and avoid its stigma and embarrassment. *Schneckloth*, 412 U.S. at 227-28. This Court also noted a community's genuine interest in encouraging consent, as the search that ensued could yield the evidence needed to solve and prosecute a crime and prevent an innocent person from being wrongly charged. *Id.* at 243.

Co-occupants such as Mrs. Randolph have a valid interest in having crimes occurring in one's own house

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framing of the question on which this Court granted review and should not now be heard to reformulate the issue.

detected. If she has reason to suspect that her spouse is conducting some illegal activity in their shared space, she should have the right to consent to a search of that shared space, regardless of any objection by her spouse. She has a legitimate interest in giving consent which could lead to the discovery of contraband and not only distance herself from a potential charge of possession based on an equal access or party to a crime theory, but rid her home of contraband that might be a danger to someone such as her child. These important societal interests are not only frustrated by, but become invisible under Respondent's proposed rule.

CONCLUSION

WHEREFORE, the State of Georgia prays that the decision of the state appellate court be reversed and that a rule be adopted which makes one co-occupant's voluntary permission sufficient to authorize a warrantless search.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GEORGIA *v.* RANDOLPH

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 04–1067. Argued November 8, 2005—Decided March 22, 2006

Respondent's estranged wife gave police permission to search the marital residence for items of drug use after respondent, who was also present, had unequivocally refused to give consent. Respondent was indicted for possession of cocaine, and the trial court denied his motion to suppress the evidence as products of a warrantless search unauthorized by consent. The Georgia Court of Appeals reversed. In affirming, the State Supreme Court held that consent given by one occupant is not valid in the face of the refusal of another physically present occupant, and distinguished *United States* v. *Matlock*, 415 U. S. 164, which recognized the permissibility of an entry made with the consent of one co-occupant in the other's absence.

Held: In the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry renders warrantless entry and search unreasonable and invalid as to him. Pp. 4–19.

(a) The Fourth Amendment recognizes a valid warrantless entry and search of a premises when the police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property, and no present co-tenant objects. *Matlock*, *supra*, at 170; *Illinois* v. *Rodriguez*, 497 U. S. 177, 186. The constant element in assessing Fourth Amendment reasonableness in such cases is the great significance given to widely shared social expectations, which are influenced by property law but not controlled by its rules. Thus, *Matlock* not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but also stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understandings about the authority that co-inhabitants may exercise in ways that affect each other's interests. Pp. 4–6.

(b) *Matlock*'s example of common understanding is readily appar-

ent. The assumption tenants usually make about their common authority when they share quarters is that any one of them may admit visitors, with the consequence that a guest obnoxious to one may be admitted in his absence. *Matlock* placed no burden on the police to eliminate the possibility of atypical arrangements, absent reason to doubt that the regular scheme was in place. Pp. 6–8.

(c) This Court took a step toward addressing the issue here when it held in *Minnesota* v. *Olson*, 495 U. S. 91, that overnight houseguests have a legitimate expectation of privacy in their temporary quarters. If that customary expectation is a foundation of a houseguest's Fourth Amendment rights, it should follow that an inhabitant of shared premises may claim at least as much. In fact, a co-inhabitant naturally has an even stronger claim. No sensible person would enter shared premises based on one occupant's invitation when a fellow tenant said to stay out. Such reticence would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority. Absent some recognized hierarchy, *e.g.*, parent and child, there is no societal or legal understanding of superior and inferior as between co-tenants. Pp. 8–10.

(d) Thus, a disputed invitation, without more, gives an officer no better claim to reasonableness in entering than the officer would have absent any consent. Disputed permission is no match for the Fourth Amendment central value of "respect for the privacy of the home," *Wilson* v. *Layne*, 526 U. S. 603, 610, and the State's other countervailing claims do not add up to outweigh it.

A co-tenant who has an interest in bringing criminal activity to light or in deflecting suspicion from himself can, *e.g.*, tell the police what he knows, for use before a magistrate in getting a warrant. This case, which recognizes limits on evidentiary searches, has no bearing on the capacity of the police, at the invitation of one tenant, to enter a dwelling over another tenant's objection in order to protect a resident from domestic violence. Though alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside, nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection. Pp. 10–16.

(e) There are two loose ends. First, while *Matlock*'s explanation for the constitutional sufficiency of a co-tenant's consent to enter and search recognized a co-inhabitant's "right to permit the inspection in his own right," 415 U. S., at 171, n. 7, the right to admit the police is not a right as understood under property law. It is, instead, the au-

Syllabus

thority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. The question here is whether customary social understanding accords the consenting tenant authority to prevail over the co-tenant's objection, a question *Matlock* did not answer. Second, a fine line must be drawn to avoid undercutting *Matlock*—where the defendant, though not present, was in a squad car not far away—and *Rodriguez*—where the defendant was asleep in the apartment and could have been roused by a knock on the door; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not part of the threshold colloquy, loses out. Such formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance specifically to avoid a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when no fellow occupant is on hand, the other according dispositive weight to the fellow occupant's expressed contrary indication. Pp. 16–18.

(f) Here, respondent's refusal is clear, and nothing in the record justifies the search on grounds independent of his wife's consent. Pp. 18–19.

278 Ga. 614, 604 S. E. 2d 835, affirmed.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, KENNEDY, GINSBURG, and BREYER, JJ., joined. STEVENS, J., and BREYER, J., filed concurring opinions. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA, J., joined. SCALIA, J., and THOMAS, J., filed dissenting opinions. ALITO, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1067

GEORGIA, PETITIONER *v.* SCOTT FITZ RANDOLPH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[March 22, 2006]

JUSTICE SOUTER delivered the opinion of the Court.

The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. *Illinois* v. *Rodriguez*, 497 U. S. 177 (1990); *United States* v. *Matlock*, 415 U. S. 164 (1974). The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.

I

Respondent Scott Randolph and his wife, Janet, separated in late May 2001, when she left the marital residence in Americus, Georgia, and went to stay with her parents in Canada, taking their son and some belongings. In July, she returned to the Americus house with the

child, though the record does not reveal whether her object was reconciliation or retrieval of remaining possessions.

On the morning of July 6, she complained to the police that after a domestic dispute her husband took their son away, and when officers reached the house she told them that her husband was a cocaine user whose habit had caused financial troubles. She mentioned the marital problems and said that she and their son had only recently returned after a stay of several weeks with her parents. Shortly after the police arrived, Scott Randolph returned and explained that he had removed the child to a neighbor's house out of concern that his wife might take the boy out of the country again; he denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers, Sergeant Murray, went with Janet Randolph to reclaim the child, and when they returned she not only renewed her complaints about her husband's drug use, but also volunteered that there were "'items of drug evidence'" in the house. Brief for Petitioner 3. Sergeant Murray asked Scott Randolph for permission to search the house, which he unequivocally refused.

The sergeant turned to Janet Randolph for consent to search, which she readily gave. She led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue he suspected was cocaine. He then left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When Sergeant Murray returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs. After getting a search warrant, they returned to the house and seized further evidence of drug use, on the basis of which Scott Randolph was indicted for possession of cocaine.

He moved to suppress the evidence, as products of a warrantless search of his house unauthorized by his wife's consent over his express refusal. The trial court denied the motion, ruling that Janet Randolph had common authority to consent to the search.

The Court of Appeals of Georgia reversed, 264 Ga. App. 396, 590 S. E. 2d 834 (2003), and was itself sustained by the State Supreme Court, principally on the ground that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." 278 Ga. 614, 604 S. E. 2d 835, 836 (2004). The Supreme Court of Georgia acknowledged this Court's holding in *Matlock*, 415 U. S. 164, that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared," *id.*, at 170, and found *Matlock* distinguishable just because Scott Randolph was not "absent" from the colloquy on which the police relied for consent to make the search. The State Supreme Court stressed that the officers in *Matlock* had not been "faced with the physical presence of joint occupants, with one consenting to the search and the other objecting." 278 Ga., at 615, 604 S. E. 2d, at 837. It held that an individual who chooses to live with another assumes a risk no greater than "'an inability to control access to the premises during [his] absence,'" *ibid.* (quoting 3 W. LaFave, Search and Seizure §8.3(d), p. 731 (3d ed. 1996) (hereinafter LaFave)), and does not contemplate that his objection to a request to search commonly shared premises, if made, will be overlooked.

We granted certiorari to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant

who is present and states a refusal to permit the search.[1] 544 U. S. 973 (2005). We now affirm.

II

To the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se*, *Payton* v. *New York*, 445 U. S. 573, 586 (1980); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455 (1971), one "jealously and carefully drawn" exception, *Jones* v. *United States*, 357 U. S. 493, 499 (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, *Rodriguez*, 497 U. S., at 181. That person might be the householder against whom evidence is sought, *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222 (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, *Matlock*, *supra*, at 170, and the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant, *Rodriguez*, *supra*, at 186. None of our co-occupant consent-to-search cases, however, has presented the further fact of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained.[2] The significance of such

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[1] All four Courts of Appeals to have considered this question have concluded that consent remains effective in the face of an express objection. See *United States* v. *Morning*, 64 F. 3d 531, 533–536 (CA9 1995); *United States* v. *Donlin*, 982 F. 2d 31, 33 (CA1 1992); *United States* v. *Hendrix*, 595 F. 2d 883, 885 (CADC 1979) *(per curiam)*; *United States* v. *Sumlin*, 567 F. 2d 684, 687–688 (CA6 1977). Of the state courts that have addressed the question, the majority have reached that conclusion as well. See, *e.g.*, *Love* v. *State*, 355 Ark. 334, 342, 138 S. W. 3d 676, 680 (2003); *Laramie* v. *Hysong*, 808 P. 2d 199, 203–205 (Wyo. 1991); but cf. *State* v. *Leach*, 113 Wash. 2d 735, 744, 782 P. 2d 1035, 1040 (1989) (en banc) (requiring consent of all present co-occupants).

[2] Mindful of the multiplicity of living arrangements, we vary the terms used to describe residential co-occupancies. In so doing we do not

a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since *Matlock*.

A

The defendant in that case was arrested in the yard of a house where he lived with a Mrs. Graff and several of her relatives, and was detained in a squad car parked nearby. When the police went to the door, Mrs. Graff admitted them and consented to a search of the house. 415 U. S., at 166. In resolving the defendant's objection to use of the evidence taken in the warrantless search, we said that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *Id.*, at 170. Consistent with our prior understanding that Fourth Amendment rights are not limited by the law of property, cf. *Katz* v. *United States*, 389 U. S. 347, 352–353 (1967), we explained that the third party's "common authority" is not synonymous with a technical property interest:

> "The authority which justified the third-party consent does not rest upon the law of property, with its attendant historical and legal refinement, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." 415 U. S., at 171, n. 7 (citations omitted).

See also *Frazier* v. *Cupp*, 394 U. S. 731, 740 (1969) ("[I]n allowing [his cousin to share use of a duffel bag] and in

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mean, however, to suggest that the rule to be applied to them is similarly varied.

leaving it in his house, [the suspect] must be taken to have assumed the risk that [the cousin] would allow someone else to look inside"). The common authority that counts under the Fourth Amendment may thus be broader than the rights accorded by property law, see *Rodriguez*, *supra*, at 181–182 (consent is sufficient when given by a person who reasonably appears to have common authority but who, in fact, has no property interest in the premises searched), although its limits, too, reflect specialized tenancy arrangements apparent to the police, see *Chapman* v. *United States*, 365 U. S. 610 (1961) (landlord could not consent to search of tenant's home).

The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules. Cf. *Rakas* v. *Illinois*, 439 U. S. 128, 144, n. 12 (1978) (an expectation of privacy is reasonable if it has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society"). *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests.

B

Matlock's example of common understanding is readily apparent. When someone comes to the door of a domestic dwelling with a baby at her hip, as Mrs. Graff did, she shows that she belongs there, and that fact standing alone is enough to tell a law enforcement officer or any other visitor that if she occupies the place along with others, she

probably lives there subject to the assumption tenants usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. As *Matlock* put it, shared tenancy is understood to include an "assumption of risk," on which police officers are entitled to rely, and although some group living together might make an exceptional arrangement that no one could admit a guest without the agreement of all, the chance of such an eccentric scheme is too remote to expect visitors to investigate a particular household's rules before accepting an invitation to come in. So, *Matlock* relied on what was usual and placed no burden on the police to eliminate the possibility of atypical arrangements, in the absence of reason to doubt that the regular scheme was in place.

It is also easy to imagine different facts on which, if known, no common authority could sensibly be suspected. A person on the scene who identifies himself, say, as a landlord or a hotel manager calls up no customary understanding of authority to admit guests without the consent of the current occupant. See *Chapman* v. *United States*, *supra* (landlord); *Stoner* v. *California*, 376 U. S. 483 (1964) (hotel manager). A tenant in the ordinary course does not take rented premises subject to any formal or informal agreement that the landlord may let visitors into the dwelling, *Chapman*, *supra*, at 617, and a hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into his room, see *Stoner*, *supra*, at 489; see also *United States* v. *Jeffers*, 342 U. S. 48, 51 (1951) (hotel staff had access to room for purposes of cleaning and maintenance, but no authority to admit police). In these circumstances, neither state-law property rights, nor common contractual arrangements, nor any other source points to a common understanding of author-

ity to admit third parties generally without the consent of a person occupying the premises. And when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; "a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted," 4 LaFave §8.4(c), at 207 (4th ed. 2004), but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom.

C

Although we have not dealt directly with the reasonableness of police entry in reliance on consent by one occupant subject to immediate challenge by another, we took a step toward the issue in an earlier case dealing with the Fourth Amendment rights of a social guest arrested at premises the police entered without a warrant or the benefit of any exception to the warrant requirement. *Minnesota* v. *Olson*, 495 U. S. 91 (1990), held that overnight houseguests have a legitimate expectation of privacy in their temporary quarters because "it is unlikely that [the host] will admit someone who wants to see or meet with the guest over the objection of the guest," *id.*, at 99. If that customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest, it presumably should follow that an inhabitant of shared premises may claim at least as much, and it turns out that the co-inhabitant naturally has an even stronger claim.

To begin with, it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would

go inside under those conditions. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.[3]

The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority. Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior, a fact reflected in a standard formulation of domestic property law, that "[e]ach cotenant . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants." 7 R. Powell, Powell on Real Property §50.03[1], p. 50–14 (M. Wolf gen. ed. 2005). The want of any recognized superior authority among disagreeing tenants is also reflected in the law's response when the disagreements cannot be resolved. The law does not ask who has the better side of the conflict; it simply provides a right to any co-tenant, even the most unreasonable, to obtain a decree partitioning the property (when the relationship is one of co-ownership) and terminating the relationship. See, *e.g.*, 2 H. Tiffany, Real Property §§468, 473, 474, pp. 297, 307–309 (3d ed. 1939 and 2006 Cum. Supp.). And while a decree of partition is not the answer to disagreement among rental tenants, this situation resembles co-

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[3]Cf. *Mincey* v. *Arizona*, 437 U. S. 385, 393 (1978) (acknowledging the right of police to respond to emergency situations "threatening life or limb" and indicating that police may conduct a warrantless search provided that the search is "'strictly circumscribed by the exigencies which justify its initiation'").

ownership in lacking the benefit of any understanding that one or the other rental co-tenant has a superior claim to control the use of the quarters they occupy together. In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.

D

Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly, in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches, *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 536–537 (1967), the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place. Since we hold to the "centuries-old principle of respect for the privacy of the home," *Wilson* v. *Layne*, 526 U. S. 603, 610 (1999), "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people," *Minnesota* v. *Carter*, 525 U. S. 83, 99 (1998) (KENNEDY, J., concurring). We have, after all, lived our whole national history with an understanding of "the ancient adage that a man's home is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown," *Miller* v. *United States*, 357 U. S. 301, 307 (1958) (internal quotation marks omitted).[4]

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[4]In the dissent's view, the centuries of special protection for the pri-

Disputed permission is thus no match for this central value of the Fourth Amendment, and the State's other countervailing claims do not add up to outweigh it.[5] Yes, we recognize the consenting tenant's interest as a citizen in bringing criminal activity to light, see *Coolidge*, 403 U. S., at 488 ("[I]t is no part of the policy underlying the Fourth . . . Amendmen[t] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals"). And we understand a co-tenant's legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal, see 4 LaFave §8.3(d), at 162, n. 72 ("The risk of being convicted of possession of drugs one knows are present and has tried to get the other occupant to remove is by no means insignificant"); cf. *Schneckloth*, 412 U. S., at 243 (evidence obtained pursuant to a consent search "may insure that a wholly innocent person is not wrongly charged with a criminal offense").

But society can often have the benefit of these interests without relying on a theory of consent that ignores an inhabitant's refusal to allow a warrantless search. The co-tenant acting on his own initiative may be able to deliver evidence to the police, *Coolidge*, *supra*, at 487–489 (sus-

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vacy of the home are over. The principal dissent equates inviting the police into a co-tenant's home over his contemporaneous objection with reporting a secret, *post*, at 13–14 (opinion of ROBERTS, C. J.), and the emphasis it places on the false equation suggests a deliberate intent to devalue the importance of the privacy of a dwelling place. The same attitude that privacy of a dwelling is not special underlies the dissent's easy assumption that privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police. *Post*, at 5.

[5] A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search. See *Mincey*, *supra*, at 393 ("[T]he privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law"); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971) ("The warrant requirement . . . is not an inconvenience to be somehow 'weighed' against the claims of police efficiency").

pect's wife retrieved his guns from the couple's house and turned them over to the police), and can tell the police what he knows, for use before a magistrate in getting a warrant.[6] The reliance on a co-tenant's information instead of disputed consent accords with the law's general partiality toward "police action taken under a warrant [as against] searches and seizures without one," *United States* v. *Ventresca*, 380 U. S. 102, 107 (1965); "the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers," *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932).

Nor should this established policy of Fourth Amendment law be undermined by the principal dissent's claim that it shields spousal abusers and other violent co-tenants who will refuse to allow the police to enter a dwelling when their victims ask the police for help, *post*, at 12 (opinion of ROBERTS, C. J.) (hereinafter the dissent). It is not that the

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[6]Sometimes, of course, the very exchange of information like this in front of the objecting inhabitant may render consent irrelevant by creating an exigency that justifies immediate action on the police's part; if the objecting tenant cannot be incapacitated from destroying easily disposable evidence during the time required to get a warrant, see *Illinois* v. *McArthur*, 531 U. S. 326, 331–332 (2001) (denying suspect access to his trailer home while police applied for a search warrant), a fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement, cf. *Schmerber* v. *California*, 384 U. S. 757, 770–771 (1966) (warrantless search permitted when "the delay necessary to obtain a warrant . . . threatened the destruction of evidence" (internal quotation marks omitted)).

Additional exigent circumstances might justify warrantless searches. See, *e.g.*, *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 298 (1967) (hot pursuit); *Chimel* v. *California*, 395 U. S. 752 (1969) (protecting the safety of the police officers); *Michigan* v. *Tyler*, 436 U. S. 499 (1978) (imminent destruction to building); *Johnson* v. *United States*, 333 U. S. 10, 15 (1948) (likelihood that suspect will imminently flee).

dissent exaggerates violence in the home; we recognize that domestic abuse is a serious problem in the United States. See U. S. Dept. of Justice, National Institute of Justice, P. Tjaden & N. Thoennes, Full Report of the Prevalence, Incidence, and Consequence of Violence Against Women 25–26 (2000) (noting that over 20 million women and 6 million men will, in the course of their lifetimes, be the victims of intimate-partner abuse); U. S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Costs of Intimate Partner Violence Against Women in the United States 19 (2003) (finding that nearly 5.3 million intimate partner victimizations, which result in close to 2 million injuries and 1300 deaths, occur among women in the United States each year); U. S. Dept. of Justice, Bureau of Justice Statistics, Crime Data Brief, C. Rennison, Intimate Partner Violence, 1993–2001 (Feb. 2003) (noting that in 2001 intimate partner violence made up 20% of violent crime against women); see also Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. Chi. L. Rev. 454, 507–508 (1992) (noting that women may feel physical insecurity in their homes as a result of abuse from domestic partners).

But this case has no bearing on the capacity of the police to protect domestic victims. The dissent's argument rests on the failure to distinguish two different issues: when the police may enter without committing a trespass, and when the police may enter to search for evidence. No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether vio-

lence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other cotenant objected. (And since the police would then be lawfully in the premises, there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause, see *Texas* v. *Brown*, 460 U. S. 730, 737–739 (1983) (plurality opinion).) Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes. See 4 LaFave §8.3(d), at 161 ("[E]ven when . . . two persons quite clearly have equal rights in the place, as where two individuals are sharing an apartment on an equal basis, there may nonetheless sometimes exist a basis for giving greater recognition to the interests of one over the other. . . . [W]here the defendant has victimized the third-party . . . the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant's objections" (internal quotation marks omitted; third omission in original)). The undoubted right of the police to enter in order to protect a victim, however, has nothing to do with the question in this case, whether a search with the consent of one cotenant is good against another, standing at the door and expressly refusing consent.[7]

None of the cases cited by the dissent support its improbable view that recognizing limits on merely evidentiary searches would compromise the capacity to protect a fearful occupant. In the circumstances of those cases,

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[7]We understand the possibility that a battered individual will be afraid to express fear candidly, but this does not seem to be a reason to think such a person would invite the police into the dwelling to search for evidence against another. Hence, if a rule crediting consent over denial of consent were built on hoping to protect household victims, it would distort the Fourth Amendment with little, if any, constructive effect on domestic abuse investigations.

there is no danger that the fearful occupant will be kept behind the closed door of the house simply because the abusive tenant refuses to consent to a search. See *United States* v. *Donlin*, 982 F. 2d 31, 32 (CA1 1992) (victimized individual was already outside of her apartment when police arrived and, for all intents and purposes, within the protective custody of law enforcement officers); *United States* v. *Hendrix*, 595 F. 2d 883, 885–886 (CADC 1979) *(per curiam)* (even if the consent of the threatened co-occupant did not justify a warrantless search, the police entry was nevertheless allowable on exigent-circumstances grounds); *People* v. *Sanders*, 904 P. 2d 1311, 1313–1315 (Colo. 1995) (victimized individual gave her consent-to-search away from her home and was not present at the time of the police visit; alternatively, exigent circumstances existed to satisfy the warrantless exception); *Brandon* v. *State*, 778 P. 2d 221, 223–224 (Alaska App. 1989) (victimized individual consented away from her home and was not present at the time of the police visit); *United States* v. *Davis*, 290 F. 3d 1239, 1241 (CA10 2002) (immediate harm extinguished after husband "order[ed]" wife out of the home).

The dissent's red herring aside, we know, of course, that alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside. The consenting tenant may simply not disclose enough information, or information factual enough, to add up to a showing of probable cause, and there may be no exigency to justify fast action. But nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection. We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physi-

cally present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.[8]

E

There are two loose ends, the first being the explanation given in *Matlock* for the constitutional sufficiency of a co-tenant's consent to enter and search: it "rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right . . . ." 415 U. S., at 171, n. 7. If *Matlock*'s co-tenant is giving permission "in his own right," how can his "own right" be eliminated by another tenant's objection? The answer appears in the very footnote from which the quoted statement is taken: the "right" to admit the police to which *Matlock* refers is not an enduring and enforceable ownership right as understood by the private law of property, but is instead the authority recognized by customary social usage as having a substantial bearing on Fourth Amendment reasonableness in specific circumstances. Thus, to ask whether the consenting tenant has the right to admit the police when a physically present fellow tenant objects is not to question whether some property right may be divested by the mere objection of another. It is, rather, the question whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection. The *Matlock* Court did not purport to answer this question, a point made clear by another statement (which the dissent does not quote): the Court

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[8]The dissent is critical that our holding does not pass upon the constitutionality of such a search as to a third tenant against whom the government wishes to use evidence seized after a search with consent of one co-tenant subject to the contemporaneous objection of another, *post*, at 11. We decide the case before us, not a different one.

described the co-tenant's consent as good against "the absent, nonconsenting" resident." *Id.*, at 170.

The second loose end is the significance of *Matlock* and *Rodriguez* after today's decision. Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. There is no ready reason to believe that efforts to invite a refusal would make a difference in many cases, whereas every co-

tenant consent case would turn into a test about the adequacy of the police's efforts to consult with a potential objector. Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time-consuming in the field and in the courtroom, with no apparent systemic justification. The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent,[9] albeit imprudently, a fact that undercuts any argument that the police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion.

III

This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police

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[9]See 4 LaFave §8.1, at 4 ("The so-called consent search is frequently relied upon by police as a means of investigating suspected criminal conduct" (footnote omitted)); Strauss, Reconstructing Consent, 92 J. Crim. L. & C. 211, 214 (2001–2002) ("Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year" (footnote omitted)).

officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained.

The judgment of the Supreme Court of Georgia is therefore affirmed.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–1067

GEORGIA, PETITIONER *v.* SCOTT FITZ RANDOLPH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[March 22, 2006]

JUSTICE STEVENS, concurring.

The study of history for the purpose of ascertaining the original understanding of constitutional provisions is much like the study of legislative history for the purpose of ascertaining the intent of the lawmakers who enact statutes. In both situations the facts uncovered by the study are usually relevant but not necessarily dispositive. This case illustrates why even the most dedicated adherent to an approach to constitutional interpretation that places primary reliance on the search for original understanding would recognize the relevance of changes in our society.

At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a "house" or "castle" unless authorized to do so by a valid warrant. See *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B.). Every occupant of the home has a right—protected by the common law for centuries and by the Fourth Amendment since 1791—to refuse entry. When an occupant gives his or her consent to enter, he or she is waiving a valuable constitutional right. To be sure that the waiver is voluntary, it is sound practice—a practice some Justices of this Court thought necessary to make the waiver voluntary[1]—for the officer to advise the

[1]See, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 284–285 (1973) (Marshall, J., dissenting) (pointing out that it is hard to comprehend "how a decision made without knowledge of available alternatives can

occupant of that right.[2] The issue in this case relates to the content of the advice that the officer should provide when met at the door by a man and a woman who are apparently joint tenants or joint owners of the property.

In the 18th century, when the Fourth Amendment was adopted, the advice would have been quite different from what is appropriate today. Given the then-prevailing dramatic differences between the property rights of the husband and the far lesser rights of the wife, only the consent of the husband would matter. Whether "the master of the house" consented or objected, his decision would control. Thus if "original understanding" were to govern the outcome of this case, the search was clearly invalid because the husband did not consent. History, however, is not dispositive because it is now clear, as a matter of constitutional law, that the male and the female are equal partners. *Reed* v. *Reed*, 404 U. S. 71 (1971).

In today's world the only advice that an officer could properly give should make it clear that each of the partners has a constitutional right that he or she may independently assert or waive. Assuming that both spouses are competent, neither one is a master possessing the power to override the other's constitutional right to deny entry to their castle.

With these observations, I join the Court's opinion.

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be treated as choice at all," and arguing that "[i]f consent to search means that a person has chosen to forego his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police").

[2]Such advice is surely preferable to an officer's expression of his or her desire to enter and to search in words that may be construed either as a command or a question. See *id.*, at 275–276 (Douglas, J., dissenting) (noting that "'[u]nder many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law.'" (quoting *Bustamonte* v. *Schneckloth*, 448 F. 2d 669, 701 (CA9 1971))).

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[March 22, 2006]

JUSTICE BREYER, concurring.

If Fourth Amendment law forced us to choose between two bright-line rules, (1) a rule that always found one tenant's consent sufficient to justify a search without a warrant and (2) a rule that never did, I believe we should choose the first. That is because, as THE CHIEF JUSTICE's dissent points out, a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases) and the consenting party's joint tenancy diminishes the objecting party's reasonable expectation of privacy.

But the Fourth Amendment does not insist upon bright-line rules. Rather, it recognizes that no single set of legal rules can capture the ever changing complexity of human life. It consequently uses the general terms "unreasonable searches and seizures." And this Court has continuously emphasized that "[r]easonableness . . . is measured . . . by examining the totality of the circumstances." *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996); see also *Illinois* v. *Wardlow*, 528 U. S. 119, 136 (2000) (STEVENS, J., concurring in part and dissenting in part); *Florida* v. *Bostick*, 501 U. S. 429, 439 (1991); *Michigan* v. *Chesternut*, 486 U. S. 567, 572–573 (1988); *Florida* v. *Royer*, 460 U. S. 491, 506 (1983) (plurality opinion).

The circumstances here include the following: The search at issue was a search solely for evidence. The

objecting party was present and made his objection known clearly and directly to the officers seeking to enter the house. The officers did not justify their search on grounds of possible evidence destruction. Cf. *Thornton* v. *United States*, 541 U. S. 615, 620–622 (2004); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 623 (1989); *Schmerber* v. *California*, 384 U. S. 757, 770–771 (1966). And, as far as the record reveals, the officers might easily have secured the premises and sought a warrant permitting them to enter. See *Illinois* v. *McArthur*, 531 U. S. 326 (2001). Thus, the "totality of the circumstances" present here do not suffice to justify abandoning the Fourth Amendment's traditional hostility to police entry into a home without a warrant.

I stress the totality of the circumstances, however, because, were the circumstances to change significantly, so should the result. The Court's opinion does not apply where the objector is not present "and object[ing]." *Ante*, at 17.

Moreover, the risk of an ongoing crime or other exigent circumstance can make a critical difference. Consider, for example, instances of domestic abuse. See *ante*, at 13. "Family disturbance calls . . . constitute the largest single category of calls received by police departments each year." Mederer & Gelles, Compassion or Control: Intervention in Cases of Wife Abuse, 4 Journal of Interpersonal Violence 25 (Mar. 1989) (emphasis deleted); see also, *e.g.*, Office of the Attorney General, California Criminal Justice Statistics Center, Domestic Violence Related Calls for Assistance, 1987–2003, County by Year, http://ag.ca.gov/cjsc/publications/misc/dvsr/tabs/8703.pdf (as visited Mar. 1, 2006, and available in Clerk of Court's case file) (providing data showing that California police received an average of 207,848 domestic violence related calls each year); Cessato, Defenders Against Domestic Abuse, Washington Post, Aug. 25, 2002, p. B8 ("In

the District [of Columbia], police report that almost half of roughly 39,000 violent crime calls received in 2000 involved domestic violence"); Zorza, Women Battering: High Costs and the State of the Law, Clearinghouse Review, p. 385 (Special Issue 1994) ("One-third of all police time is spent responding to domestic disturbance calls"). And, law enforcement officers must be able to respond effectively when confronted with the possibility of abuse.

If a possible abuse victim invites a responding officer to enter a home or consents to the officer's entry request, that invitation (or consent) itself could reflect the victim's fear about being left alone with an abuser. It could also indicate the availability of evidence, in the form of an immediate willingness to speak, that might not otherwise exist. In that context, an invitation (or consent) would provide a special reason for immediate, rather than later, police entry. And, entry following invitation or consent by one party ordinarily would be reasonable even in the face of direct objection by the other. That being so, contrary to the THE CHIEF JUSTICE's suggestion, *post*, at 13, today's decision will not adversely affect ordinary law enforcement practices.

Given the case-specific nature of the Court's holding, and with these understandings, I join the Court's holding and its opinion.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[March 22, 2006]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA joins, dissenting.

The Court creates constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation. The rule the majority fashions does not implement the high office of the Fourth Amendment to protect privacy, but instead provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room. And the cost of affording such random protection is great, as demonstrated by the recurring cases in which abused spouses seek to authorize police entry into a home they share with a nonconsenting abuser.

The correct approach to the question presented is clearly mapped out in our precedents: The Fourth Amendment protects privacy. If an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or places* with the government. And just as an individual who has shared illegal plans or incriminating documents with another cannot interpose an objection when that other person turns the information over to the government, just because the individual happens to be present at the time, so too someone who shares

a place with another cannot interpose an objection when that person decides to grant access to the police, simply because the objecting individual happens to be present.

A warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it. Co-occupants have "assumed the risk that one of their number might permit [a] common area to be searched." *United States* v. *Matlock*, 415 U. S. 164, 171, n. 7 (1974). Just as Mrs. Randolph could walk upstairs, come down, and turn her husband's cocaine straw over to the police, she can consent to police entry and search of what is, after all, her home, too.

I

In *Illinois* v. *Rodriguez*, 497 U. S. 177 (1990), this Court stated that "[w]hat [a person] is assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'" *Id.*, at 183. One element that can make a warrantless government search of a home "'reasonable'" is voluntary consent. *Id.*, at 184; *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973). Proof of voluntary consent "is not limited to proof that consent was given by the defendant," but the government "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises." *Matlock*, *supra*, at 171. Today's opinion creates an exception to this otherwise clear rule: A third-party consent search is unreasonable, and therefore constitutionally impermissible, if the co-occupant against whom evidence is obtained was present and objected to the entry and search.

This exception is based on what the majority describes as "widely shared social expectations" that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary ac-

commodation." *Ante*, at 6, 9. But this fundamental predicate to the majority's analysis gets us nowhere: Does the objecting cotenant accede to the consenting cotenant's wishes, or the other way around? The majority's assumption about voluntary accommodation simply leads to the common stalemate of two gentlemen insisting that the other enter a room first.

Nevertheless, the majority is confident in assuming—confident enough to incorporate its assumption into the Constitution—that an invited social guest who arrives at the door of a shared residence, and is greeted by a disagreeable co-occupant shouting "'stay out,'" would simply go away. *Ante*, at 8. The Court observes that "no sensible person would go inside under those conditions," *ante*, at 8–9, and concludes from this that the inviting co-occupant has no "authority" to insist on getting her way over the wishes of her co-occupant, *ante*, at 10. But it seems equally accurate to say—based on the majority's conclusion that one does not have a right to prevail over the express wishes of his co-occupant—that the objector has no "authority" to insist on getting *his* way over his co-occupant's wish that her guest be admitted.

The fact is that a wide variety of differing social situations can readily be imagined, giving rise to quite different social expectations. A relative or good friend of one of two feuding roommates might well enter the apartment over the objection of the other roommate. The reason the invitee appeared at the door also affects expectations: A guest who came to celebrate an occupant's birthday, or one who had traveled some distance for a particular reason, might not readily turn away simply because of a roommate's objection. The nature of the place itself is also pertinent: Invitees may react one way if the feuding roommates share one room, differently if there are common areas from which the objecting roommate could readily be expected to absent himself. Altering the numbers

might well change the social expectations: Invitees might enter if two of three co-occupants encourage them to do so, over one dissenter.

The possible scenarios are limitless, and slight variations in the fact pattern yield vastly different expectations about whether the invitee might be expected to enter or to go away. Such shifting expectations are not a promising foundation on which to ground a constitutional rule, particularly because the majority has no support for its basic assumption—that an invited guest encountering two disagreeing co-occupants would flee—beyond a hunch about how people would typically act in an atypical situation.

And in fact the Court has not looked to such expectations to decide questions of consent under the Fourth Amendment, but only to determine when a search has occurred and whether a particular person has standing to object to a search. For these latter inquiries, we ask whether a person has a subjective expectation of privacy in a particular place, and whether "the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U. S. 347, 361 (1967) (Harlan, J., concurring); see *Minnesota* v. *Olson*, 495 U. S. 91, 95–96, 100 (1990) (extending *Katz* test to standing inquiry). But the social expectations concept has not been applied to all questions arising under the Fourth Amendment, least of all issues of consent. A criminal might have a strong expectation that his longtime confidant will not allow the government to listen to their private conversations, but however profound his shock might be upon betrayal, government monitoring with the confidant's consent is reasonable under the Fourth Amendment. See *United States* v. *White*, 401 U. S. 745, 752 (1971).

The majority suggests that "widely shared social expectations" are a "constant element in assessing Fourth Amendment reasonableness," *ante*, at 6 (citing *Rakas* v. *Illinois*,

439 U. S. 128, 144, n. 12 (1978)), but that is not the case; the Fourth Amendment precedents the majority cites refer instead to a "legitimate expectation of *privacy*." *Ibid.* (emphasis added; internal quotation marks omitted). Whatever social expectation the majority seeks to protect, it is not one of privacy. The very predicate giving rise to the question in cases of shared information, papers, containers, or places is that privacy has been shared with another. Our common social expectations may well be that the other person will not, in turn, share what we have shared with them with another—including the police—but that is the risk we take in sharing. If two friends share a locker and one keeps contraband inside, he might trust that his friend will not let others look inside. But by sharing private space, privacy has "already been frustrated" with respect to the lockermate. *United States* v. *Jacobsen*, 466 U. S. 109, 117 (1984). If two roommates share a computer and one keeps pirated software on a shared drive, he might assume that his roommate will not inform the government. But that person has given up his privacy with respect to his roommate by saving the software on their shared computer.

A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by a variety of labels—courtesy, good manners, custom, protocol, even honor among thieves. The Constitution, however, protects not these but privacy, and once privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant.

II

Our cases reflect this understanding. In *United States* v. *White*, we held that one party to a conversation can consent to government eavesdropping, and statements

made by the other party will be admissible at trial. 401 U. S., at 752. This rule is based on privacy: "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . [I]f he has no doubts, or allays them, or risks what doubt he has, the risk is his." *Ibid.*

The Court has applied this same analysis to objects and places as well. In *Frazier* v. *Cupp*, 394 U. S. 731 (1969), a duffel bag "was being used jointly" by two cousins. *Id.*, at 740. The Court held that the consent of one was effective to result in the seizure of evidence used against both: "[I]n allowing [his cousin] to use the bag and in leaving it in his house, [the defendant] must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Ibid.*

As the Court explained in *United States* v. *Jacobsen*, *supra*:

> "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information: 'This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.'" *Id.*, at 117 (quoting *United States* v. *Miller*, 425 U. S. 435, 443 (1976)).

The same analysis applies to the question whether our privacy can be compromised by those with whom we share

common living space. If a person keeps contraband in common areas of his home, he runs the risk that his co-occupants will deliver the contraband to the police. In *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), Mrs. Coolidge retrieved four of her husband's guns and the clothes he was wearing the previous night and handed them over to police. We held that these items were properly admitted at trial because "when Mrs. Coolidge of her own accord produced the guns and clothes for inspection, . . . it was not incumbent on the police to stop her or avert their eyes." *Id.*, at 489.

Even in our most private relationships, our observable actions and possessions are private at the discretion of those around us. A husband can request that his wife not tell a jury about contraband that she observed in their home or illegal activity to which she bore witness, but it is she who decides whether to invoke the testimonial marital privilege. *Trammel* v. *United States*, 445 U. S. 40, 53 (1980). In *Trammel*, we noted that the former rule prohibiting a wife from testifying about her husband's observable wrongdoing at his say so "goes far beyond making 'every man's house his castle,' and permits a person to convert his house into 'a den of thieves.'" *Id.*, at 51–52 (quoting 5 J. Bentham, Rationale of Judicial Evidence 340 (1827)).

There is no basis for evaluating physical searches of shared space in a manner different from how we evaluated the privacy interests in the foregoing cases, and in fact the Court has proceeded along the same lines in considering such searches. In *Matlock*, police arrested the defendant in the front yard of a house and placed him in a squad car, and then obtained permission from Mrs. Graff to search a shared bedroom for evidence of Matlock's bank robbery. 415 U. S., at 166. Police certainly could have assumed that Matlock would have objected were he consulted as he sat handcuffed in the squad car outside. And in *Rodriguez*, where Miss Fischer offered to facilitate the arrest of

her sleeping boyfriend by admitting police into an apartment she apparently shared with him, 497 U. S., at 179, police might have noted that this entry was undoubtedly contrary to Rodriguez's social expectations. Yet both of these searches were reasonable under the Fourth Amendment because Mrs. Graff had authority, and Miss Fischer apparent authority, to admit others into areas over which they exercised control, despite the almost certain wishes of their *present* co-occupants.

The common thread in our decisions upholding searches conducted pursuant to third-party consent is an understanding that a person "assume[s] the risk" that those who have access to and control over his shared property might consent to a search. *Matlock*, 415 U. S., at 171, n. 7. In *Matlock*, we explained that this assumption of risk is derived from a third party's "joint access or control for most purposes" of shared property. *Ibid.* And we concluded that shared use of property makes it "reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right." *Ibid.*

In this sense, the risk assumed by a joint occupant is comparable to the risk assumed by one who reveals private information to another. If a person has incriminating information, he can keep it private in the face of a request from police to share it, because he has that right under the Fifth Amendment. If a person occupies a house with incriminating information in it, he can keep that information private in the face of a request from police to search the house, because he has that right under the Fourth Amendment. But if he shares the information—or the house—with another, that other can grant access to the police in each instance.[1]

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[1]The majority considers this comparison to be a "false equation," and even discerns "a deliberate intent to devalue the importance of the privacy of a dwelling place." *Ante*, at 10–11, n. 4. But the differences

To the extent a person wants to ensure that his possessions will be subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed. Mr. Randolph acknowledged this distinction in his motion to suppress, where he differentiated his law office from the rest of the Randolph house by describing it as an area that "was solely in his control and dominion." App. 3. As to a "common area," however, co-occupants with "joint access or control" may consent to an entry and search. *Matlock*, *supra*, at 171, n. 7.

By emphasizing the objector's presence and noting an occupant's understanding that obnoxious guests might "be admitted in [one's] absence," *ante*, at 7, the majority appears to resurrect an agency theory of consent suggested in our early cases. See *Stoner* v. *California*, 376 U. S. 483,

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between the majority and this dissent reduce to this: Under the majority's view, police may not enter and search when an objecting co-occupant is *present at the door*, but they *may* do so when he is asleep in the next room; under our view, the co-occupant's consent is effective in both cases. It seems a bit overwrought to characterize the former approach as affording great protection to a man in his castle, the latter as signaling that "the centuries of special protection for the privacy of the home are over." *Ibid.* The Court in *United States* v. *Matlock*, 415 U. S. 164 (1974), drew the same comparison the majority faults today, see *id.*, at 171, n. 7, and the "deliberate intent" the majority ascribes to this dissent is apparently shared by all Courts of Appeals and the great majority of State Supreme Courts to have considered the question, see *ante*, at 4, n. 1.

The majority also mischaracterizes this dissent as assuming that "privacy shared with another individual is privacy waived for all purposes including warrantless searches by the police." *Ante*, at 11, n. 4. The point, of course, is not that a person waives his privacy by sharing space with others such that police may enter at will, but that sharing space necessarily entails a limited yielding of privacy *to the person with whom the space is shared*, such that the other person shares authority to consent to a search of the shared space. See *supra*, at 2, 5–10.

489 (1964) (stating that a hotel clerk could not consent to a search of a guest's room because the guest had not waived his rights "by word or deed, either directly or through an agent"); *Chapman* v. *United States*, 365 U. S. 610, 616–617 (1961). This agency theory is belied by the facts of *Matlock* and *Rodriguez*—both defendants were present but simply not asked for consent—and the Court made clear in those cases that a co-occupant's authority to consent rested not on an absent occupant's delegation of choice to an agent, but on the consenting co-occupant's "joint access or control" of the property. *Matlock*, *supra*, at 171, n. 7; see *Rodriguez*, *supra*, at 181; *United States* v. *McAlpine*, 919 F. 2d 1461, 1464, n. 2 (CA10 1990) ("[A]gency analysis [was] put to rest by the Supreme Court's reasoning in *Matlock*").

The law acknowledges that although we might not expect our friends and family to admit the government into common areas, sharing space entails risk. A person assumes the risk that his co-occupants—just as they might report his illegal activity or deliver his contraband to the government—might consent to a search of areas over which they have access and control. See *United States* v. *Karo*, 468 U. S. 705, 726 (1984) (O'Connor, J., concurring in part and concurring in judgment) (finding it a "relatively easy case . . . when two persons share identical, overlapping privacy interests in a particular place, container, or conversation. Here *both* share the power to surrender each other's privacy to a third party").

III

The majority states its rule as follows: "[A] warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Ante*, at 15–16.

Just as the source of the majority's rule is not privacy, so

too the interest it protects cannot reasonably be described as such. That interest is not protected if a co-owner happens to be absent when the police arrive, in the backyard gardening, asleep in the next room, or listening to music through earphones so that only his co-occupant hears the knock on the door. That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive. Usually when the development of Fourth Amendment jurisprudence leads to such arbitrary lines, we take it as a signal that the rules need to be rethought. See *California* v. *Acevedo*, 500 U. S. 565, 574, 580 (1991). We should not embrace a rule at the outset that its *sponsors* appreciate will result in drawing fine, formalistic lines. See *ante*, at 17.

Rather than draw such random and happenstance lines—and pretend that the Constitution decreed them—the more reasonable approach is to adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others, and that the law historically permits those to whom we have yielded our privacy to in turn cooperate with the government. Such a rule flows more naturally from our cases concerning Fourth Amendment reasonableness and is logically grounded in the concept of privacy underlying that Amendment.

The scope of the majority's rule is not only arbitrary but obscure as well. The majority repeats several times that a present co-occupant's refusal to permit entry renders the search unreasonable and invalid "as to him." *Ante*, at 1, 15–16, 18. This implies entry and search would be reasonable "as to" someone else, presumably the consenting co-occupant and any other absent co-occupants. The normal Fourth Amendment rule is that items discovered in plain view are admissible if the officers were legitimately on the premises; if the entry and search were reasonable "as to" Mrs.

Randolph, based on her consent, it is not clear why the cocaine straw should not be admissible "as to" Mr. Randolph, as discovered in plain view during a legitimate search "as to" Mrs. Randolph. The majority's differentiation between entry focused on discovering whether domestic violence has occurred (and the consequent authority to seize items in plain view), and entry focused on searching for evidence of other crime, is equally puzzling. See *ante*, at 13–14. This Court has rejected subjective motivations of police officers in assessing Fourth Amendment questions, see *Whren* v. *United States*, 517 U. S. 806, 812–813 (1996), with good reason: The police do not need a particular reason to ask for consent to search, whether for signs of domestic violence or evidence of drug possession.

While the majority's rule protects something random, its consequences are particularly severe. The question presented often arises when innocent cotenants seek to disassociate or protect themselves from ongoing criminal activity. See, *e.g.*, *United States* v. *Hendrix*, 595 F. 2d 883, 884 (CADC 1979) (wife asked police "to get her baby and take [a] sawed-off shotgun out of her house"); *People* v. *Cosme*, 48 N. Y. 2d 286, 288–289, 293, 397 N. E. 2d 1319, 1320, 1323 (1979) (woman asked police to remove cocaine and a gun from a shared closet); *United States* v. *Botsch*, 364 F. 2d 542, 547 (CA2 1966). Under the majority's rule, there will be many cases in which a consenting co-occupant's wish to have the police enter is overridden by an objection from another present co-occupant. What does the majority imagine will happen, in a case in which the consenting co-occupant is concerned about the other's criminal activity, once the door clicks shut? The objecting co-occupant may pause briefly to decide whether to destroy any evidence of wrongdoing or to inflict retribution on the consenting co-occupant first, but there can be little doubt that he will attend to both in short order. It is no answer to say that the consenting co-occupant can depart

with the police; remember that it is her home, too, and the other co-occupant's very presence, which allowed him to object, may also prevent the consenting co-occupant from doing more than urging the police to enter.

Perhaps the most serious consequence of the majority's rule is its operation in domestic abuse situations, a context in which the present question often arises. See *Rodriguez*, 497 U. S., at 179; *United States* v. *Donlin*, 982 F. 2d 31 (CA1 1992); *Hendrix*, *supra*; *People* v. *Sanders*, 904 P. 2d 1311 (Colo. 1995) (en banc); *Brandon* v. *State*, 778 P. 2d 221 (Alaska App. 1989). While people living together might typically be accommodating to the wishes of their cotenants, requests for police assistance may well come from coinhabitants who are having a disagreement. The Court concludes that because "no sensible person would go inside" in the face of disputed consent, *ante*, at 8–9, and the consenting cotenant thus has "no recognized authority" to insist on the guest's admission, *ante*, at 10, a "police officer [has] no better claim to reasonableness in entering than the officer would have in the absence of any consent at all," *ibid*. But the police officer's superior claim to enter is obvious: Mrs. Randolph did not invite the police to join her for dessert and coffee; the officer's precise purpose in knocking on the door was to assist with a dispute between the Randolphs—one in which Mrs. Randolph felt the need for the protective presence of the police. The majority's rule apparently forbids police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects.[2]

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[2] In response to this concern, the majority asserts that its rule applies "merely [to] evidentiary searches." *Ante*, at 14. But the fundamental premise of the majority's argument is that an inviting co-occupant has "no recognized authority" to "open the door" over a co-occupant's objection. *Ante*, at 10; see also *ante*, at 1 ("[A] physically present co-occupant's stated refusal to permit *entry* prevails, rendering the warrantless search unreasonable and invalid as to him" (emphasis added));

The majority acknowledges these concerns, but dismisses them on the ground that its rule can be expected to give rise to exigent situations, and police can then rely on an exigent circumstances exception to justify entry. *Ante*, at 12, n. 6. This is a strange way to justify a rule, and the fact that alternative justifications for entry might arise does not show that entry pursuant to consent is unreasonable. In addition, it is far from clear that an exception for emergency entries suffices to protect the safety of occupants in domestic disputes. See, *e.g.*, *United States* v. *Davis*, 290 F. 3d 1239, 1240–1241 (CA10 2002) (finding no exigent circumstances justifying entry when police responded to a report of domestic abuse, officers heard no noise upon arrival, defendant told officers that his wife was out of town, and wife then appeared at the door seemingly unharmed but resisted husband's efforts to close the door).

Rather than give effect to a consenting spouse's authority to permit entry into her house to avoid such situations, the majority again alters established Fourth Amendment rules to defend giving veto power to the objecting spouse. In response to the concern that police might be turned away under its rule before entry can be justified based on exigency, the majority creates a new rule: A "good reason" to enter, coupled with one occupant's consent, will ensure

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ante, at 8 ("[A] caller standing at the door of shared premises would have no confidence . . . to *enter* when a fellow tenant stood there saying 'stay out'" (emphasis added)); *ante*, at 10 ("[A] disputed invitation, without more, gives a police officer no . . . claim to reasonableness in *entering*" (emphasis added)). The point is that the majority's rule transforms what may have begun as a request for consent to conduct an evidentiary search into something else altogether, by giving veto power over the consenting co-occupant's wishes to an occupant who would exclude the police from *entry*. The majority would afford the now quite vulnerable consenting co-occupant sufficient time to gather her belongings and leave, see *ante*, at 13, apparently putting to one side the fact that it is her castle, too.

that a police officer is "lawfully in the premises." *Ante*, at 13, 14. As support for this "consent plus a good reason" rule, the majority cites a treatise, which itself refers only to *emergency* entries. *Ante*, at 14 (citing 4 W. LaFave, Search and Seizure §8.3(d), p. 161 (4th ed. 2004)). For the sake of defending what it concedes are fine, formalistic lines, the majority spins out an entirely new framework for analyzing exigent circumstances. Police may now enter with a "good reason" to believe that "violence (or threat of violence) has just occurred or is about to (or soon will) occur." *Ante*, at 13–14. And apparently a key factor allowing entry with a "good reason" short of exigency is the very consent of one co-occupant the majority finds so inadequate in the first place.

The majority's analysis alters a great deal of established Fourth Amendment law. The majority imports the concept of "social expectations," previously used only to determine when a search has occurred and whether a particular person has standing to object to a search, into questions of consent. *Ante*, at 6, 8. To determine whether entry and search are reasonable, the majority considers a police officer's subjective motive in asking for consent, which we have otherwise refrained from doing in assessing Fourth Amendment questions. *Ante*, at 13–14. And the majority creates a new exception to the warrant requirement to justify warrantless entry short of exigency in potential domestic abuse situations. *Ibid.*

Considering the majority's rule is solely concerned with protecting a person who happens to be present at the door when a police officer asks his co-occupant for consent to search, but not one who is asleep in the next room or in the backyard gardening, the majority has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy. Perhaps one day, as the consequences of the majority's analytic approach become clearer, today's opinion will be treated the same

way the majority treats our opinions in *Matlock* and *Rodriguez*—as a "loose end" to be tied up. *Ante*, at 17.

One of the concurring opinions states that if it had to choose between a rule that a cotenant's consent was valid or a rule that it was not, it would choose the former. *Ante*, at 1 (opinion of BREYER, J.). The concurrence advises, however, that "no single set of legal rules can capture the ever changing complexity of human life," *ibid.*, and joins what becomes the majority opinion, "[g]iven the case-specific nature of the Court's holding," *ante*, at 3. What the majority establishes, in its own terms, is "*the rule* that a physically present inhabitant's express refusal of consent to a police search *is dispositive* as to him, regardless of the consent of a fellow occupant." *Ante*, at 18 (emphases added). The concurrence joins with the apparent "understandin[g]" that the majority's "rule" is not a rule at all, but simply a "case-specific" holding. *Ante*, at 3 (opinion of BREYER, J.). The end result is a complete lack of practical guidance for the police in the field, let alone for the lower courts.

* * *

Our third-party consent cases have recognized that a person who shares common areas with others "assume[s] the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U. S., at 171, n. 7. The majority reminds us, in high tones, that a man's home is his castle, *ante*, at 10, but even under the majority's rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate. Then it is his co-owner's castle. And, of course, it is not his castle if he wants to consent to entry, but his co-owner objects. Rather than constitutionalize such an arbitrary rule, we should acknowledge that a decision to share a private place, like a decision to share a secret or a confidential document, necessarily entails the risk that those with whom we share may in turn choose to share—for their

own protection or for other reasons—with the police.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 04–1067

GEORGIA, PETITIONER *v.* SCOTT FITZ RANDOLPH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

[March 22, 2006]

JUSTICE SCALIA, dissenting.

I join the dissent of THE CHIEF JUSTICE, but add these few words in response to JUSTICE STEVENS' concurrence.

It is not as clear to me as it is to JUSTICE STEVENS that, at the time the Fourth Amendment was adopted, a police officer could enter a married woman's home over her objection, and could not enter with only her consent. Nor is it clear to me that the answers to these questions depended solely on who owned the house. It is entirely clear, however, that *if* the matter *did* depend solely on property rights, a latter-day alteration of property rights would also produce a latter-day alteration of the Fourth Amendment outcome—without altering the Fourth Amendment itself.

JUSTICE STEVENS' attempted critique of originalism confuses the original import of the Fourth Amendment with the background sources of law to which the Amendment, on its original meaning, referred. From the date of its ratification until well into the 20th century, violation of the Amendment was tied to common-law trespass. See *Kyllo* v. *United States*, 533 U. S. 27, 31–32 (2001); see also *California* v. *Acevedo*, 500 U. S. 565, 581, 583 (1991) (SCALIA, J., concurring in judgment). On the basis of that connection, someone who had power to license the search of a house by a private party could authorize a police search. See 1 Restatement of Torts §167, and Comment *b* (1934); see also *Williams* v. *Howard*, 110 S. C. 82, 96 S. E.

251 (1918); *Fennemore* v. *Armstrong*, 29 Del. 35, 96 A. 204 (Super. Ct. 1915). The issue of *who* could give such consent generally depended, in turn, on "historical and legal refinements" of property law. *United States* v. *Matlock*, 415 U. S. 164, 171, n. 7 (1974). As property law developed, individuals who previously could not authorize a search might become able to do so, and those who once could grant such consent might no longer have that power. But changes in the law of property to which the Fourth Amendment referred would not alter the Amendment's meaning: that anyone capable of authorizing a search by a private party could consent to a warrantless search by the police.

There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. The Fifth Amendment provides, for instance, that "private property" shall not "be taken for public use, without just compensation"; but it does not purport to define property rights. We have consistently held that "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998) (quoting *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972)). The same is true of the Fourteenth Amendment Due Process Clause's protection of "property." See *Castle Rock* v. *Gonzales*, 545 U. S. ___, ___ (2005). This reference to changeable law presents no problem for the originalist. No one supposes that the *meaning* of the Constitution changes as States expand and contract property rights. If it is indeed true, therefore, that a wife in 1791 could not authorize the search of her husband's house, the fact that current property law provides otherwise is no more troublesome for the originalist than the well established fact that a State must compensate its takings of even those property rights that did not exist at the time of the Founding.

In any event, JUSTICE STEVENS' panegyric to the *equal* rights of women under modern property law does not support his conclusion that "[a]ssuming . . . both spouses are competent, neither one is a master possessing the power to override the other's constitutional right to deny entry to their castle." *Ante*, at 2–3. The issue at hand is what to do when there is a *conflict* between two equals. Now that women have authority to consent, as JUSTICE STEVENS claims men alone once did, it does not follow that the spouse who *refuses* consent should be the winner of the contest. JUSTICE STEVENS could just as well have followed the same historical developments to the opposite conclusion: Now that "the male and the female are equal partners," *ante*, at 2, and women can consent to a search of their property, men can no longer obstruct their wishes. Men and women are no more "equal" in the majority's regime, where both sexes can veto each other's consent, than on the dissent's view, where both sexes cannot.

Finally, I must express grave doubt that today's decision deserves JUSTICE STEVENS' celebration as part of the forward march of women's equality. Given the usual patterns of domestic violence, how often can police be expected to encounter the situation in which a man urges them to enter the home while a woman simultaneously demands that they stay out? The most common practical effect of today's decision, insofar as the contest between the sexes is concerned, is to give men the power to stop women from allowing police into their homes—which is, curiously enough, *precisely* the power that JUSTICE STEVENS disapprovingly presumes men had in 1791.

SUPREME COURT OF THE UNITED STATES

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[March 22, 2006]

JUSTICE THOMAS, dissenting.

The Court has long recognized that "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." *Miranda* v. *Arizona*, 384 U. S. 436, 477–478 (1966). Consistent with this principle, the Court held in *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), that no Fourth Amendment search occurs where, as here, the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing by the accused. *Id.*, at 486–490. Because *Coolidge* squarely controls this case, the Court need not address whether police could permissibly have conducted a general search of the Randolph home, based on Mrs. Randolph's consent. I respectfully dissent.

In the instant case, Mrs. Randolph told police responding to a domestic dispute that respondent was using a substantial quantity of cocaine. Upon police request, she consented to a general search of her residence to investigate her statements. However, as the Court's recitation of the facts demonstrates, *ante*, at 2, the record is clear that no such general search occurred. Instead, Sergeant Brett Murray asked Mrs. Randolph where the cocaine was located, and she showed him to an upstairs bedroom, where he saw the "piece of cut straw" on a dresser. Corrected Tr. of Motion to Suppression Hearing in Case No. 2001R–699 (Super. Ct. Sumter Cty., Ga., Oct. 3, 2002), pp.

8–9. Upon closer examination, Sergeant Murray observed white residue on the straw, and concluded the straw had been used for ingesting cocaine. *Id.*, at 8. He then collected the straw and the residue as evidence. *Id.*, at 9.

Sergeant Murray's entry into the Randolphs' home at the invitation of Mrs. Randolph to be shown evidence of respondent's cocaine use does not constitute a Fourth Amendment search. Under this Court's precedents, only the action of an agent of the government can constitute a search within the meaning of the Fourth Amendment, because that Amendment "was intended as a restraint upon the activities of *sovereign authority*, and was not intended to be a limitation upon other than governmental agencies." *Burdeau* v. *McDowell*, 256 U. S. 465, 475 (1921) (emphasis added). See also *Coolidge*, 403 U. S., at 487. Applying this principle in *Coolidge*, the Court held that when a citizen leads police officers into a home shared with her spouse to show them evidence relevant to their investigation into a crime, that citizen is not acting as an agent of the police, and thus no Fourth Amendment search has occurred. *Id.*, at 488–498.

Review of the facts in *Coolidge* clearly demonstrates that it governs this case. While the police interrogated Coolidge as part of their investigation into a murder, two other officers were sent to his house to speak with his wife. *Id.*, at 485. During the course of questioning Mrs. Coolidge, the police asked whether her husband owned any guns. *Id.*, at 486. Mrs. Coolidge replied in the affirmative, and offered to retrieve the weapons for the police, apparently operating under the assumption that doing so would help to exonerate her husband. *Ibid.* The police accompanied Mrs. Coolidge to the bedroom to collect the guns, as well as clothing that Mrs. Coolidge told them her husband had been wearing the night of the murder. *Ibid.*

Before this Court, Coolidge argued that the evidence of

the guns and clothing should be suppressed as the product of an unlawful search because Mrs. Coolidge was acting as an "'instrument,'" or agent, of the police by complying with a "'demand'" made by them. *Id.*, at 487. The Court recognized that, had Mrs. Coolidge sought out the guns to give to police wholly on her own initiative, "there can be no doubt under existing law that the articles would later have been admissible in evidence." *Ibid.* That she did so in cooperation with police pursuant to their request did not transform her into their agent; after all, "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Id.*, at 488. Because the police were "acting normally and properly" when they asked about any guns, and questioning Mrs. Coolidge about the clothing was "logical and in no way coercive," the Fourth Amendment did not require police to "avert their eyes" when Mrs. Coolidge produced the guns and clothes for inspection.[1] *Id.*, at 488–489.

This case is indistinguishable from *Coolidge*, compelling the conclusion that Mrs. Randolph was not acting as an agent of the police when she admitted Sergeant Murray into her home and led him to the incriminating evidence.[2]

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[1]Although the Court has described *Coolidge* as a "third-party consent" case, *United States* v. *Matlock*, 415 U. S. 164, 171 (1974), the Court's opinion, by its own terms, does not rest on its conception of Mrs. Coolidge's authority to consent to a search of her house or the possible relevance of Mr. Coolidge's absence from the scene. *Coolidge*, 403 U. S., at 487 ("[W]e need not consider the petitioner's further argument that Mrs. Coolidge could not or did not 'waive' her husband's constitutional protection against unreasonable searches and seizures"). See also *Walter* v. *United States*, 447 U. S. 649, 660–661, n. 2 (1980) (White, J., concurring in part and concurring in judgment) ("Similarly, in *Coolidge* v. *New Hampshire*, the Court held that a wife's voluntary action in turning over to police her husband's guns and clothing did not constitute a search and seizure by the government").

[2]The Courts of Appeals have disagreed over the appropriate inquiry

Just as Mrs. Coolidge could, of her own accord, have offered her husband's weapons and clothing to the police without implicating the Fourth Amendment, so too could Mrs. Randolph have simply retrieved the straw from the house and given it to Sergeant Murray. Indeed, the majority appears to concede as much. *Ante*, at 11-12 ("The cotenant acting on his own initiative may be able to deliver evidence to the police, *Coolidge*, *supra*, at 487–489 . . . , and can tell the police what he knows, for use before a magistrate in getting a warrant"). Drawing a constitutionally significant distinction between what occurred here and Mrs. Randolph's independent production of the relevant evidence is both inconsistent with *Coolidge* and unduly formalistic.[3]

Accordingly, the trial court appropriately denied respondent's motion to suppress the evidence Mrs. Randolph provided to the police and the evidence obtained as a result of the consequent search warrant. I would therefore reverse the judgment of the Supreme Court of Georgia.

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to be performed in determining whether involvement of the police transforms a private individual into an agent or instrument of the police. See *United States* v. *Pervaz*, 118 F. 3d 1, 5–6 (CA1 1997) (summarizing approaches of various Circuits). The similarity between this case and *Coolidge* avoids any need to resolve this broader dispute in the present case.

[3]That Sergeant Murray, unlike the officers in *Coolidge*, may have intended to perform a general search of the house is inconsequential, as he ultimately did not do so; he viewed only those items shown to him by Mrs. Randolph. Nor is it relevant that, while Mrs. Coolidge intended to aid the police in apprehending a criminal because she believed doing so would exonerate her husband, Mrs. Randolph believed aiding the police would implicate her husband.